No. [redacted] 17

APPENDIX TO APPELLANTS' BRIEF

FILED
DEC 5 1957
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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Civ. 61-166

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC., *Appellants,*

v.

LOEW'S INC., RKO THEATRES, INC. and RKO FILM BOOKING CORP., *Appellees.*

Volume I

(Pages 1 to 395)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Vol.	Page
Summary of Docket Entries Pursuant to Rule 15(b)	I	1
Complaint	I	4
Supplement to Complaint	I	15
Transcript of Trial	I	17

TESTIMONY

Witnesses for Plaintiff

MacMillen, William C., Jr.		
Direct Examination	I	59
Cross Examination	I	113
Re-Called:		
Direct Examination	I	340
Gross, Norman		
Direct Examination	I	127
Preliminary Cross-Examination	I	141
Direct Examination Resumed	I	145
Preliminary Cross Examination	I	177
Direct Examination Resumed	I	184
Cross Examination	I	187
Cross Examination Resumed	I	231
Re-direct Examination	I	239
Re-called:		
Direct Examination	I	288
Cross Examination	I	296
Re-direct Examination	I	312
Re-cross Examination	I	316
Re-called:		
Direct Examination	I	351
Cross Examination	I	358
Friedberg, Saul		
Direct Examination	I	224
Young, Charles F.		
Direct Examination	I	229
Peoples, John		
Direct Examination	I	257

	Vol.	Page
Kaplan, Leon		
Direct Examination	I	321
Cross Examination	I	335
Agnew, Neil		
Direct Examination	II	535
Cross Examination	II	542
Re-direct Examination	II	543
Witnesses for Defendant RKO		
Miller, Robert L.		
Direct Examination	I	368
Cross Examination	I	381
Schwartz, Sol A.		
Direct Examination	II	398
Cross Examination	II	416
Re-direct Examination	II	437
Re-cross Examination	II	460
Witnesses for Defendant Loew's, Inc.		
Vogel, Joseph R.		
Direct Examination	II	463
Cross Examination	II	479
Re-direct Examination	II	505
Re-cross Examination	II	506
Youngstein, Max E.		
Direct Examination	II	507
Cross Examination	II	514
Downing, Russell V.		
Direct Examination	II	521
Opinion of Judge Archie O. Dawson	II	555
Notice of Appeal	II	582
Judgment Dismissing Complaint	II	583
Amended Notice of Appeal	II	584

EXHIBITS

	Identified Vol.	Identified Page	Received Vol.	Received Page	Text Vol.	Text Page
Plaintiff's Exhibit 1—Final Decree in Paramount Case against Loew's, Incorporated, Warner Bros. Pictures, Inc. and Twentieth Century Fox Film Corp.	I	48	I	57	II	585
Plaintiff's Exhibit 2—Findings of Fact in Paramount Case, filed February 8, 1950	I	48	I	362	II	594
Plaintiff's Exhibit 5—First & Second Neighborhood Run Theaters Operated by Loew & RKO Circuits in Boroughs of Manhattan, Brooklyn, Bronx & Queens, 1945-1950	I	75	I	171	II	645
Plaintiff's Exhibit 9—Division of Eight Major Distributors' Product Between Loew & RKO Metropolitan Circuits 1948-49 as Shown by Film Rentals Paid by Circuits	I	84	I	184	II	646
Plaintiff's Exhibit 10—Comparison of Eagle-Lion Revenue with Revenue of Major Distributors from Subsequent Run Theatres in Metropolitan New York	I	87	I	257	II	647
Plaintiff's Exhibit 22—Distribution of Film Rental Paid by the RKO and Loew Metropolitan Circuits	I	184	I	185	II	648
Plaintiff's Exhibit 26—Summary, Film Rental, Ratios to National Less N.Y. Metropolitan Plus N.Y. First Run	I	351	I	352	II	649
Plaintiff's Exhibit 30—Exchange of Correspondence in August 1948 between Arthur Krim of Eagle-Lion and Joseph Vogel of Loew's, Inc.	II	504	II	505	II	650
Plaintiff's Exhibit 32—Data as to Circuit Rentals on Eagle Lion Pictures which played on Loew or RKO Circuits	II	544	II	545	II	653

	Identified Vol.	Identified Page	Received Vol.	Received Page	Text Vol.	Text Page
Plaintiff's Exhibit 33—Data as to Circuit Rentals on 96 Picture Sample Furnished by 8 Major Distributors and RKO and Loew Circuits	II	545	II	545	II	655
Plaintiff's Exhibit 34 — Schedule Showing Interval Between First Run Broadway and First Neighborhood Run on all Eagle-Lion Films which Played Long Half on RKO or Loew Circuit	II	545	II	545	II	658
Excerpt from Printed Record of Stenographer's Minutes in United States of America v. Paramount Pictures, Inc. et al., Equity No. 87-273, United States District Court, Southern District of New York, November 8, 1948					II	659
Excerpt from Appendix to Brief for the United States of America in the Supreme Court of the United States, October Term, 1947, Nos. 79-84 (Appeal and Cross Appeal by the Government and the Defendants, Respectively, taken in United States v. Paramount Pictures, Inc. et al.) Government Exhibit No. 424					II	664

United States District Court

SOUTHERN DISTRICT OF NEW YORK

Civ. 61-166

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC., *Plaintiffs*,

v.

LOEW'S, INC., RKO THEATRES, INC., and RKO FILM BOOKING CORP., *Defendants*.

Summary of Docket Entries Pursuant to Rule 15(b)

October 3, 1950—Complaint filed by Eagle Lion Classics, Inc., Eagle Lion Studios, Inc., Eagle Lion Films, Inc., PRC Productions, Inc., and Pathe Industries, Inc. (previous name for Chesapeake Industries, Inc.), Plaintiffs, against Loew's, Inc., Radio-Keith-Orpheum Corp., RKO Radio Pictures, Inc., RKO Theatres, Inc., RKO Film Booking Corp., Paramount Film Distributing Corp., Warner Bros. Pictures Distributing Corp., Twentieth Century-Fox Film Corp., Columbia Pictures Corp., Big U Film Exchange Inc., and United Artists Corp., Defendants.

November 2, 1953—Pretrial order filed, Ryan J.

December 8, 1953—Supplement to Complaint filed, alleging sale of plaintiff Eagle Lion Classics, Inc. to the defendant, United Artists Corporation, and the change in the name of the plaintiff Pathe Industries, Inc. to Chesapeake Industries, Inc.

May 3, 19[illegible]—Case called before A. N. Hand, C.J.

May 3, 1954—Judgment of A. N. Hand, C.J., filed dismissing complaint as to defendants Paramount Film Distributing Corp., United Artists Corp., Universal Film Exch. Inc., successor to Big U Film Exchange, Inc., Warner Bros. Pictures Distributing Corp., Columbia Pictures Corp., RKO Radio Pictures, Inc., and Twentieth Century-Fox Film Corp. on the ground that case against them had become moot.

May 3, 1954—Judgment of A. N. Hand, C.J. filed dismissing complaint as to defendant Loew's, Inc. so far as it seeks equitable relief.

May 4, 1954—Order and judgment of A. N. Hand, C.J. filed dismissing complaint as to defendants RKO Theatres, Inc. and RKO Film Booking Corp.

May 4, 1954—Order and Judgment of A. N. Hand, C.J. dismissing complaint as to defendant Loew's, Inc.

May 3, 1954—Order of A. N. Hand, C.J. filed that complaint of Eagle Lion Classics, Inc. against the defendants and each of them be dismissed.

May 3, 1954—Filed stipulation and order discontinuing and dismissing complaint as to defendant Radio-Keith-Orpheum Corp.

May 5, 1954—Filed opinion of A. N. Hand, C.J., #21,097, dismissing action for equitable relief and discharging the distributor defendants; dismissing the claim for damages on the ground that it had been released; dismissing complaint and giving judgment for the defendants.

May 28, 1954—Notice of appeal filed to effect that plaintiffs, Eagle Lion Studios, Inc., Eagle Lion Films, Inc., PRC Productions, Inc. and Chesapeake Industries, Inc. appeal (1) from the orders and judgments entered

on May 4, 1954 dismissing the complaint as to defendants Loew's, Inc., RKO Theatres, Inc. and RKO Film Booking Corp. and (2) from that part of order and judgment entered on May 3, 1954 dismissing the complaint as to RKO Radio Pictures, Inc.

March 2, 1955—Filed mandate from the United States Court of Appeals that the judgments of dismissal of the District Court as to Loew's, Inc., RKO Theatres, Inc. and RKO Film Booking Corp. are reversed and action remanded, and judgment of dismissal of District Court as to RKO Radio Pictures, Inc. affirmed in accordance with opinion of U.S.C.A.

February 8, 9, 10, 14, 15, 16 and 17, 1956—Trial before Dawson, J.

June 11, 1956—Filed Opinion #22,679 complaint dismissed; this opinion shall constitute findings of fact and conclusions of law. Dawson, J.

July 5, 1956—Filed notice of appeal.

July 12, 1956—Filed judgment #61,060 dismissing complaint, as supplemented and amended, on merits.

July 23, 1956—Filed amended notice of appeal.

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 61-166

EAGLE LION CLASSICS, INC., EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., PATHE INDUSTRIES, INC., *Plaintiffs*,

v.

LOEW'S, INC., RADIO-KEITH-ORPHEUM CORP., RKO RADIO PICTURES, INC., RKO THEATRES, INC., RKO FILM BOOKING CORP., PARAMOUNT FILM DISTRIBUTING CORP., WARNER BROS. PICTURES DISTRIBUTING CORP., TWENTIETH CENTURY-FOX FILM CORP., COLUMBIA PICTURES CORP., BIG U FILM EXCHANGE, INC., UNITED ARTISTS CORP., *Defendants*.

I.

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the above-named defendants under Sections 15 and 26 of Title 15, U.S.C., being part of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopolies", as amended, commonly known as the Sherman and Clayton Acts. The purpose of this action is to recover damages against above-named defendants for injuries to the plaintiffs in their businesses of producing and distributing motion pictures directly resulting from such defendants' violations of the antitrust laws of the United States, and to restrain and enjoin the defendants from continuing their illegal monopolistic practices and conspiracies in unreasonable restrain of trade and commerce, to the irreparable injury of the plaintiffs, as hereinafter alleged.

2. The business of producing, distributing and exhibiting motion pictures involves a constant, continuous stream of trade and commerce among the states of the United States and with foreign nations, consisting of procuring of contracts for stories, players, studio facilities and production personnel, the production of motion pictures, the solicitation and the making of contracts for the future delivery over periods of time of such films; the transportation of negative films from the studios to the laboratories where positive prints of the motion picture films are prepared, and from there shipped to sales outlets known as film exchanges throughout the United States; the continuous distribution of said films from the exchanges to and from the approximately 20,000 motion picture theatres located throughout the United States in the areas served by the respective exchanges; the interchange of said films between each exchange and other exchanges of the same distributor located in other states of the United States and in foreign nations; and finally the shipment of said films from the exchanges throughout the United States to points within the State of New York or elsewhere for scrapping. The plaintiffs and all the defendants are directly engaged in trade and commerce among the various states, and with foreign nations, and the practices hereinafter mentioned operated directly upon the above-described course of interstate and foreign business.

3. Each of the corporate defendants maintains an office and transacts business within the Southern District of New York.

II.

Description of Plaintiffs

4. Eagle Lion Classics, Inc. is a corporation organized and existing under the laws of the State of New York with its principal place of business at 165 West 46th Street, New York, New York and is engaged in the business of distributing motion pictures, some of which are produced

in the United States and others of which are produced in foreign countries.

5. Eagle Lion Studios, Inc. is a corporation organized and existing under the laws of the State of California with its principal place of business at 7324 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

6. Eagle Lion Films, Inc. is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business at 165 West 46th Street, New York, N. Y., and, until about June, 1950, was engaged in the business of distributing motion pictures produced by Eagle Lion Studios, Inc., and other producers, domestic and foreign.

7. PRC Productions, Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 165 West 46th Street, New York, New York, and is engaged in the business of producing motion pictures.

8. Pathe Industries, Inc. is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business at 105 East 106th Street, New York, New York. Pathe Industries, Inc. owns all of the outstanding stock of Eagle Lion Classics, Inc., Eagle Lion Studios, Inc., Eagle Lion Films, Inc. and PRC Productions, Inc., and owns motion pictures heretofore distributed by Eagle Lion Films, Inc. and motion pictures distributed by Eagle Lion Classics, Inc.

III.

Description of Defendants

9. Loew's Incorporated (hereinafter called Loew) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in

the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

10. Radio-Keith-Orpheum Corporation (hereinafter sometimes called RKO) is a corporation organized and existing under the laws of the State of Delaware, with principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

11. RKO Radio Pictures, Inc., a wholly-owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the motion picture industry.

12. RKO Theatres, Inc., a wholly-owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

13. RKO Film Booking Corporation, a wholly-owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of booking motion pictures for exhibition.

14. Paramount Film Distributing Corporation (hereinafter called Paramount), a wholly-owned subsidiary of Paramount Pictures Corp., formerly Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501

Broadway, New York, New York, and is engaged in the distribution branch of the motion picture industry.

15. Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.), (hereinafter called Warner), a wholly-owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

16. Twentieth Century-Fox Film Corporation (hereinafter called Fox) is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

17. Columbia Pictures Corporation (hereinafter called Columbia) is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

18. Big U Film Exchange, Inc. (hereinafter called Big U), a wholly-owned subsidiary of Universal Corporation (hereinafter called Universal), is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

19. United Artists Corporation (hereinafter called United Artists) is a corporation organized and existing under the laws of the State of Delaware with its principal place of

business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

IV.

Description of Exhibitor Defendants' Businesses

20. The exhibitor defendants, Loew and RKO and RKO's distribution and exhibition subsidiaries, are integrated units in the motion picture industry, embracing within their own corporate structures the producing, distributing and exhibiting phases of the industry. These two integrated structures are presently awaiting dissolution under the decrees hereinafter described.

21. The exhibitor defendants, together with Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, and Paramount Pictures, Inc., were found guilty, *inter alia*, by a three-judge court in *United States* v. *Paramount Pictures, Inc.* on December 31, 1946 of unreasonably restraining the trade of film distributors by conspiring with each other to eliminate competition among themselves and with other exhibitors, as theatre operators, by the joint ownership or operation of theatres which would otherwise compete with one another in licensing films, and by conspiring with each of the distributor defendants to discriminate against independent distributors.

22. Said findings were affirmed by the Supreme Court of the United States on May 3, 1948 in a decision which rejected the claim of the defendants in that suit that these findings were erroneous, and which accepted the Government's contention that the relief granted was inadequate to remedy the illegal restraints described in the findings.

23. After hearing evidence in November, 1948 alleged by the defendants in that suit to show a voluntary reformation during 1947 and 1948 of their illegal conduct, the three-judge court, on June 6, 1949, held that the offenses previously found were continuing and that the theatre-

owning defendants had actually monopolized film exhibition in most of the principal population centers.

24. On February 8, 1950, the three-judge Court made new findings which reaffirmed the foregoing conspiracy findings and also found that the exhibitor defendants, Loew and RKO and RKO's distribution and exhibition subsidiaries, had actually monopolized neighborhood prior run product of all the distributor defendants in the metropolitan New York area by an arbitrary division of the films released by the distributor defendants and by securing for the theatres of the exhibitor defendants clearance over substantially all of the surrounding independent theatres.

25. The Court entered a judgment requiring the divorcement of the Loew theatre circuit from the Loew distribution business and the divestiture, from the circuit, of theatres which might be shown in supplemental proceedings not yet had to be illegal fruits of the conspiracy.

26. On November 8, 1948, before the taking of evidence on the remand, a final consent judgment was entered as to the RKO defendants which required the divorcement of the RKO theatre circuit from its distribution business, the dissolution of all joint theatre ownership between RKO and other exhibitors and the divestiture of certain specific theatres intended to restore independent competition to areas monopolized by RKO. Said relief has not yet been fully carried out. On March 9, 1949, a similar final consent judgment was entered against the Paramount defendants.

27. On June 5, 1950 the Supreme Court, in rejecting appeals from the judgment of February 8, 1950 by Loew, Twentieth Century-Fox Film Corporation and Warner Bros. Pictures, Inc., affirmed the foregoing finding of monopolization by Loew and the three-judge court's judgment that Loew's theatres should be divorced from its distribution business in order to prevent a continuing discriminatory and illegal use of said theatres.

V.

Description of Distributor Defendants' Businesses

28. The distributor defendants, Loew, RKO Radio Pictures, Inc., Warner, Fox, Columbia, Paramount, Big U, and United Artists are engaged in distributing motion pictures. In the above-described Court proceedings, these distributor defendants were found guilty of unreasonably restraining trade and commerce in the distribution of motion pictures and of attempting to monopolize such trade and commerce by conspiring with each other and with each of exhibitor defendants, and with Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corp., and Paramount Pictures, Inc. to maintain a nationwide, uniform and discriminatory run, clearance and admission price structure.

29. The final judgments entered against said distributor defendants in the above-described court proceedings all provided that each feature film of such distributor defendants should be licensed only upon the basis of the merits of each individual film and each individual theatre seeking to exhibit it on a particular run, without discrimination among competing exhibitors. Said judgments also provided that film license restrictions which had the effect of protecting one theatre from competition by another, known as "clearance agreements", were presumptively invalid and could only be made by the distributor defendants where they could show facts justifying the clearance in question.

VI.

Combination and Conspiracy

30. As an integral part of the foregoing nationwide conspiracy and continuing from sometime prior to 1944 down to the date of the filing of this complaint, all defendants have conspired to monopolize and have monopolized trade and commerce in the distribution and exhibition of motion

pictures in the New York metropolitan area (which includes the five boroughs of Greater New York City, southern portion of Westchester County and western portion of Nassau County, New York State) with the purpose and effect of excluding from the neighborhood prior run theatres of RKO and Loew in such market the motion pictures produced and distributed by independent producers and distributors, including plaintiff producers and distributors, by the following means:

(a) A substantial part of the playing time available in RKO and Loew neighborhood prior run theatres has been arbitrarily reserved for film distribution by Loew and RKO Radio Pictures, Inc.;

(b) The exhibitor defendants have agreed with each other that their affiliated neighborhood prior run theatres in the New York metropolitan area will not compete for the motion pictures of any distributor, including the motion pictures of plaintiffs, and such theatres have not and do not engage in such competition;

(c) The distributor defendants have agreed with each other and with the exhibitor defendants to a non-competitive division of their film in the New York metropolitan area, pursuant to which RKO affiliated neighborhood prior run houses will exhibit only the product of RKO, Fox, Warner and half of the film of Universal, and Loew affiliated neighborhood prior run theatres will exhibit only the product of Loew, Paramount, United Artists, Columbia and half of the film of Universal;

(d) The exhibitor defendants have agreed with each other and with the distributor defendants to preserve and protect the above-described monopoly by according the film of distributor defendants substantial playing time in their neighborhood prior run theatres on preferential run and clearance terms, with the result that most of the film distributed by independent distributors, including plaintiffs, is completely excluded from all access to such thea-

tres, and the remainder of such film is not granted access to the neighborhood prior run theatres of exhibitor defendants on terms comparable to those granted to distributor defendants.

(e) Each of the exhibitor defendants has also unreasonably restricted competition for the films of plaintiffs and other distributors in said New York metropolitan area through so-called theatre pooling arrangements with otherwise independent exhibitors, which arrangements took the form of joint ownership or management of theatres.

VII.

Effects of the Conspiracy

31. As a direct result of the monopolization of the neighborhood prior run market in the New York metropolitan area by Loew and RKO and the division of that market between them, plaintiffs have been excluded from all competitive access and, with respect to many films, from substantially all access of any kind to that essential market.

32. The neighborhood prior run market in the New York metropolitan area is the most important single market for the exhibition of film in the world. On some film, approximately 14 percent or more of the national gross box office receipts will be derived from the New York metropolitan area, and the most important segment of that percentage is derived from the neighborhood prior run theatres. Film rentals from neighborhood prior run theatres in metropolitan New York will often mark the difference between profit and loss on the production and distribution of film. Exclusion from such market automatically threatens a loss on the cost of producing and distributing of film and continuous exclusion from such market automatically threatens a distributor with elimination from trade and commerce in the distribution of motion pictures.

33. As a direct result of the unlawful monopolization by the defendants of the neighborhood prior run market

in the New York metropolitan area described above, plaintiff Eagle Lion Films, Inc. was driven out of the motion picture distribution business, and plaintiff Eagle Lion Classics, Inc. is now threatened with irreparable injury and will be driven out of the business of distributing film product if the defendants are permitted illegally to continue to deny Eagle Lion Classics, Inc. all competitive access to the neighborhood prior run market in the New York metropolitan area.

34. As a further direct result of the unlawful exclusion of plaintiffs from the neighborhood prior run market in metropolitan New York by the defendants pursuant to the above-described illegal scheme to monopolize such market, plaintiffs have been directly damaged in their businesses in the amount of approximately $5,000,000.

WHEREFORE, plaintiffs demand:

(1) That plaintiffs have judgment against the exhibitor defendants for treble the amount of the aforesaid damage and costs, which costs should include a reasonable attorney's fee;

(2) An injunction restraining, until such time as the defendants can show that independent competing theatres are sufficient in number and quality to afford a competitive market for the plaintiffs' film in metropolitan New York,

(a) the grant of any exclusive run by any distributor defendant to any neighborhood prior run theatre owned or controlled by an exhibitor defendant in the New York metropolitan area;

(b) the simultaneous exhibition of any particular RKO film in two or more RKO theatres in the New York metropolitan area or of any particular Loew film in two or more Loew theatres in the New York metropolitan area; and

(c) any sale or purchase of theatres or theatre interests by RKO or Loew in metropolitan New York which would eliminate competing outlets for plaintiffs' film;

(3) That the Court grant plaintiffs such other and further relief as to the Court may seem just in the premises.

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Supplement to Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

Pursuant to Rule 15 D of the Federal Rules of Civil Procedure the plaintiffs herein file this supplemental pleading setting forth material facts which have occurred since the filing of the complaint herein.

1. On April 11, 1951, the Plaintiff, Pathe Industries, Inc., made an agreement with the defendant, United Artists Corporation, pursuant to which the cause of action herein of the plaintiff, Eagle Lion Classics, Inc., was assigned to the plaintiff Pathe Industries, Inc. and plaintiff Eagle Lion Classics, Inc. was then sold to the defendant, United Artists Corporation.

2. On May 1, 1952, the name of the plaintiff, Pathe Industries, Inc., was changed to Chesapeake Industries, Inc.

/s/ MORRIS GUTT
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/s/ WILLIAM L. McGOVERN
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Attorneys for Plaintiffs

Nov. 24, 1953

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 61-166

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., and CHESAPEAKE INDUSTRIES, INC., *Plaintiffs*,

vs.

LOEW'S, INC., RKO THEATRES, INC. and RKO FILM BOOKING CORP., *Defendants*.

Before:

HON. ARCHIE O. DAWSON,
District Judge.

New York, February 8, 1956,
10.30 o'clock a.m.

APPEARANCES:

JAMES O. O'CONNOR, ESQ.,
WILLIAM L. McGOVERN, ESQ.,
ROBERT L. WRIGHT, ESQ., and
SEYMOUR KRIEGER, ESQ.,
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Stuart Marks, Esq., of Counsel.

2 O'BRIEN, DRISCOLL & RAFTERY, ESQS.,
Attorneys for Defendants RKO Theatres, Inc. and RKO Film Booking Corp.;
Edward C. Raftery, Esq.,
George A. Raftery, Esq., and
William F. Whitman, Esq., of Counsel.

The Court: This is the case of Eagle Lion Studios, Inc. and others against Loew's, Inc., RKO Theatres, Inc. and RKO Film Booking Corporation.

Plaintiffs ready?

Mr. O'Connor: Plaintiff is ready, your Honor.

The Court: Defendant ready?

Mr. Gillespie: Defendant ready.

The Court: I notice that the issues in this case have been formulated by a pretrial order dated November 2, 1953, which under the rules of this Court governs the future conduct of the case, and the issues to be tried are formulated as follows:

1. Did the defendants combine and conspire in violation of the antitrust laws of the United States to exclude plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first-run Broadway.

2. If so, were the plaintiffs directly damaged in their business and or property as the result of said illegal combination and conspiracy and if so in what amount.

Those are the two issues apparently which exist in this case.

Now does the plaintiff desire to make a preliminary statement?

Mr. O'Connor: Your Honor, plaintiff has retained trial counsel in this matter from Washington, D.C. May I present to the Court Mr. William McGovern, at the end of the table, Mr. Robert Wright next to me, and Mr. Seymour Krieger. I respectfully move the Court that these gentlemen be admitted to practice before it for the purpose of this action only.

The Court: Delighted to have you admitted for the purpose of this case. Glad to have you here.

Mr. O'Connor: Thank you very much.

The Court: Do you wish to make any preliminary statement for the education of the Court on this matter,
4 or shall we proceed right with the presentation of evidence?

Mr. McGovern: Your Honor, I am disposed to do whatever you prefer. You have had the pretrials for a week; I don't know whether you have had an opportunity to examine them.

The Court: I have read the pretrials, yes.

Mr. McGovern: It occurs to me a short opening statement might serve to clarify some of the issues.

The Court: I think it would be good if you make it short and pointed.

Mr. McGovern: This is a suit by a distributor of motion pictures to recover under the antitrust laws for damages that were allegedly inflicted by the RKO and Loew circuits in the first neighborhood run market in New York.

The case, as we shall contend, arises out of the conspiracy to monopolize the distribution and exhibition of the first neighborhood run market by the RKO and Loew circuits in New York. The conspiracy which we contend was found by the Court in the major Paramount decision by a Court of this district.

5 The plaintiffs here are four affiliated producing and distributed corporations that operated initially under the style PRC. Those were trade initials for the name Producers Releasing Corporation, and from 1946 down to the period of time involved in this lawsuit, which is a substantial period we are concerned with here, they were operating under the name Eagle Lion. The parent corporation was initially known as Pathe Industries and changed to Chesapeake, and we shall refer to the producing and distributing companies as the Eagle Lion companies and the parent corporation as Chesapeake Industries.

In addition to damages, your Honor, the complaint initially asked for injunctive relief against the continued

operation of the alleged conspiracy in this first neighborhood run market. However, after the complaint was filed, our distributing subsidiary was sold to one of the defendants, United Artists Corporation, and, consequently, the equitable claim became moot. As a result, the distributing defendants have all been dismissed out of the case for lack of any claim against them. That means, then, that at the present time the defendants are the two chains of motion pictures theatres in this New York metropolitan area, the RKO and Loew circuits.

6 I would like at the outset, your Honor, to point out that in our judgment it is difficult to overemphasize the importance of this first neighborhood run market in the motion picture business in the United States. That is simply because of the fact the concentration of the population in this area is such that a very large proportion of any motion picture's total national gross film rental will be and almost always is derived from this New York market. In fact, I believe the testimony will show that approximately 15 per cent of a picture's total national gross would ordinarily be derived from this market that is involved in this lawsuit.

Of that large proportion of the total national gross which is taken out of this New York area, far and away the largest single proportion of it is derived from the so-called first neighborhood run theatres. That results from the fact that of course there are scores of those theatres across New York. They are the finest and largest, the best appointed theatres, they are strategically located in the various neighborhoods for the purpose of attracting the patronage.

7 The Court: Let me ask you this so that I get the terminology right. A first-run neighborhood theatre is different from a first-run theatre?

Mr. McGovern: That is right.

The Court: First-run theatres in New York would be considered the Broadway theatres?

Mr. McGovern: The Broadway theatres, and, with some small exceptions, immediately after Broadway we will have a first borough run, for instance, in Brooklyn, but that is your first run, in New York.

The Court: Then you have a first neighborhood run?

Mr. McGovern: That is right.

The Court: And after that?

Mr. McGovern: Second neighborhood, third neighborhood, you play on right down the rest of the play-off pattern.

The Court: All right.

Mr. McGovern: But I merely want to emphasize the importance in terms of the economic success of any distributor of this first neighborhood run market in New York. It is the most important single market throughout the world for the exploitation of a motion picture,

8 and that is so to the point where very frequently a distributor will use one of the showcases on Broadway almost for the sole purpose of exploiting the purchase and building up its advertising value before it moves into the first-run neighborhood market.

Now, we contend, and we believe that the evidence will fairly demonstrate, that for many, many years the first-run neighborhood market has been controlled and dominated by these two circuits, the RKO and Loew's circuits. The two circuits together in the aggregate control approximately 90 of the best, the largest and the outstanding houses in the neighborhoods across the whole metropolitan area.

The Court: They did in those years involved in the suit?

Mr. McGovern: That is right.

The Court: This case, to get the time correct, involves merely the period between 1946 to 1950; is that right?

Mr. McGovern: That is the damage period, Judge Dawson, that is involved in the lawsuit. Our complaint alleges a conspiracy running from 1943 down to 1951, but by virtue of prolonged negotiation with the defendants, in-

terrogatories and what material we supplied each
9 other on pretrial, we cut the damage period down for convenience to 1946 to 1950, and that is the period that is before you now.

The Court: In that period you say these two chains had 90 theatres?

Mr. McGovern: Approximately 90 theatres. They had them in 1945 at the time the Paramount decision came down and the original filing of the conspiracy was made, and our testimony will show by the independent evidence that that situation continued for the next four years at least.

The Court: Let me ask you this: What percentage of the neighborhood first-run theatres did those two chains comprehend?

Mr. McGovern: In terms of the first neighborhood themselves, I would suppose that of those 90 I would estimate 75 were first neighborhood, the others were second neighborhood, also part of the chain but playing after the break on the first neighborhood run.

The Court: How many other first neighborhood run theatres were there not in these two chains?

Mr. McGovern: In the year 1945, which is the year we will start our proof on because of the Paramount
10 case, the testimony, I believe, will show that there were approximately 17 first neighborhood run in addition to the ones in the two chains, but I want to emphasize that of those 17 not more than three or four at the outside were in competition with the chains. In other words, they were located in areas that were not directly in competition, because the phrase "first neighborhood run" means exactly that: where a chain has that area it enjoys a first-run clearance over anybody else.

Now, the importance of that first neighborhood control enjoyed by the two chains, your Honor, is this, that the playing custom and practice in New York establishes pretty much a slotted arrangement so that subsequent run

theatres or circuits take directly for their billing in the course of a week, take directly the long half bill off the RKO circuit and then the long half bill off the Loew circuit. If you were an independent playing a second run, you would know in advance what your next week's bill was going to be, because you would see what was playing in the first-run RKO and Loew circuits.

The result of that sort of a slotting arrangement is, unless you manage to get on either the RKO circuit or the Loew circuit in one of those preferred
11 playing positions, that you are utterly blocked out of the New York market entirely. You can't play anywhere to speak of.

Our testimony will show, I think, that the difference is measured in terms of the availabilities to you of theatre opportunities; that if you get on the circuits and play the slotted arrangement right down through the metropolitan area, you will enjoy about 600 different theatre opportunities in New York, whereas if you fail to do that, you are reduced to trying to negotiate about 100 contracts. It is just that serious in terms of your access at the top of the slot.

Now, in addition to controlling the first neighborhood run market through the actual ownership and operation and control of these first neighborhood houses across the metropolitan area, the two chains also, in an effort, I suggest, to avoid any competition between the two of them, entered into an agreement with all the eight major distributors whereby the product of eight major distributors was itself allocated on a non-competitive basis to the chains.

The result of that was that the RKO circuit
12 exhibited the product only of RKO, Warner, Fox and one-half of Universal, and the Loew circuit exhibited by and large only the product of Loew, Paramount, Columbia, United Artists and one-half of Universal;

in other words, the Universal product was split between the two circuits.

Now, the effect of that obviously, we contend, was, in the first place, to prevent the rise of a competitive circuit. These two circuits had all of the available product of the major distributors tied down to this split of product that I have described, so that it would be impossible for an additional circuit to come in and compete in a serious way with existing circuits.

Secondly, it operated, of course, to keep RKO and Loew from competing with each other.

The Court: Will either of those contentions result in demonstrable damages to your client?

Mr. McGovern: Yes. I was about to come to that, your Honor. It seems to me the result of that monopoly situation, in the first place of exhibition and in the second place of distribution, was to confront an independent coming into New York with this picture that instead
13 of being entitled, as he might suppose, to try to sell his product theatre by theatre—for example, you go to any one of these 90 theatres—and try to get himself the best available playing arrangements he could in terms of his competition, he was confronted with the necessity of selling that entire circuit.

In the case of Loew's, let's say, he had to sell 60 theatres or he sold none. In the case of RKO he had the same situation on a somewhat smaller scale: He had to sell 30 theatres or he sold none. That is the first thing that happened to an independent when he came in: he was denied any opportunity to approach the theatres theatre by theatre and to attempt to sell his product picture by picture.

Over and above his finding these 90 most desirable theatres tied up so that he had to sell a package here or a package there or nothing at all, he obviously, when he came to the circuit, was faced with the knowledge, your Honor, that he had to take a back seat. Each of these

circuits, as a result of the conspiracy I have described, of course, had an obligation to their conspirator and distributors to take care of their distributors' product first.

That is certainly clear.

14 The Court: I understand that. Let me ask you this: How were these pictures licensed either to the chains or anybody else? What were the practical mechanics? To whom did they go? What about the motion picture exchange? He had me a little on that.

Mr. McGovern: Our testimony will show that our vice president in charge of sales would go to either one of the two circuits and, by the best arguments available to him, undertake to sell him on the desirability of playing our picture in a desired spot in one of the two circuits. In those cases where he succeeded in getting access to the circuit at all and we were not excluded 100 per cent, some of our product did get in; but in those rare cases where he did get in at all he would be presented with a circuit contract that covered all the theatres in the circuit. In some cases it would be sold on a percentage arrangement where they would simply give us a percentage of the gross rentals derived from the entire circuit without regard to the theatre situation within the circuit itself.

The Court: There was no other opportunity to sell, except by going directly to one of these two

15 circuits, or, I suppose, to the few individual theatres that were outside?

Mr. McGovern: Precisely. On occasion we have tried to go to one of the other houses outside and see what you could do, and I say all that meant was that if you were a seller familiar with this market you knew that as soon as you gave up the opportunity or the chance of selling the RKO and Loew's circuits you automatically cut down the number of availabilities to you in New York from 600 to 100.

The Court: Were there in those days anything like the motion picture exchanges that I heard about in another

case I tried, where things were put up and people could go in and people on the exchange would bid for them, or anything like that?

Mr. McGovern: I think not. To the best of my knowledge, not in the New York market.

Coming back to the situation that confronts the individual distributor when he seeks to sell his product here, I pointed out, your Honor, that first he is confronted with the necessity of having a blanket, say, of the entire circuit or he sells nothing and he knows if he doesn't sell that circuit he is not going to sell any of the subsequent
16 run circuits because they take directly in the playing slots allotted to them in the circuit.

In the next place, I suggest that, of course, he realizes that the RKO and Loew's circuits, in order to maintain the integrity of the conspiracy, so to speak, are under a terrific obligation to keep their co-conspirators happy, so that Loew, first, must make an effort to see to it that the Paramount product which is committed with the Loew circuit and is never displayed on the RKO circuit is played just as much as it is humanly possible to play.

So admittedly when you have all those theatres tied together in a single circuit the possibility of consummation is cut down a good deal, because instead of 60 theatres exhibiting perhaps 60 pictures, they are going to exhibit only one picture or two pictures in a preferred spot per week.

So the exhibitor, I suggest to you, knows that whatever he gets is going to be the tail end of the time, if there is any.

Finally, of course, he realizes that because of that situation he is practically devoid of bargaining power of any kind whatsoever. When he goes to the circuit he
17 takes pretty much what they offer him and he takes it on the terms they offer, and by "terms" I am referring not only to film rental terms but playing time and how they slot him on the circuit.

Our testimony will show, we think, Judge Dawson, that that situation that confronted the independent trying to sell his product here in New York had a threefold impact on the independent distributor. In the first place, as you can appreciate, I believe, with regard to the product that he had under contract for distribution, it, of course, meant that his opportunity to exploit that product in the New York area was seriously and severely curtailed by this monopolized situation that confronted him, so that even on the product he had for distribution, his chances of realizing the full potential of the exploitation of that product was practically nil in this market.

Secondly—and this was also a severe repercussion on the distributor—it meant that he had practically no chance of trying to persuade independent producers to give him their product of distribution, and, of course, an independent distributor like ourselves had to depend primarily upon the product we can get from independent producers for distribution.

Now, your Honor will realize that that available product was rather small to begin with, because by virtue of the integration that prevailed up until the divorcement that was recently decreed in this industry, of course the Loew product was distributed by the Loew distributing organization; there was no chance of any independent ever getting any of that. Furthermore, each of these integrated distributors themselves—not each of them, but most of them were competing with the independent distributor in an effort themselves to get the contracts of the very desirable and more notable independent producers.

But in our own case, for example, in the case of any independent distributor, a producer knew that if he gave his product—let us say a producer with a well known name, like Walter Wanger—to Eagle Lion to distribute, the producer was on notice that the chances of our getting him any kind of a fair break in New York was extremely remote.

The necessary consequence of that—and the testimony, I think, will clearly show that—was that we were unable to obtain any fair proportion of the independent product available for distribution.

And then, thirdly, it is quite clear, again, that the result of those two situations taken together was to so severely reduce the bargaining power of an independent distributor like ourselves that we had no choice when we were dealing with an independent producer such as Wanger but to take from him what terms he would offer, which meant that instead of our being able to obtain the usual distribution fee of approximately 27½ per cent, we were frequently compelled to promise the producer 30 per cent or 35 per cent just for the opportunity of trying to get to distribute his product.

The Court: I notice you have been talking about the New York market. Is there anything different between the New York market and the markets in other cities?

Mr. McGovern: The principal difference in the New York market—you mean, in terms of distribution?

The Court: No. As I gathered from a quick look at the Paramount case, the conspiracy, as I understood it, was nationwide.

Mr. McGovern: That is right.

The Court: Now, here we are talking about a particular situation in the New York area. Does the same situation exist in the Chicago area, the Los Angeles area?

Mr. McGovern: We will contend that, to a lesser extent—and, of course, the Paramount decision reflects that—an independent like ourself was seriously handicapped across the country in trying to sell.

For example, if you go down to our home town, Washington, D. C., in the old days you had a Warner circuit and you were lucky if you could get in there if you were an independent, because Warner had the same kind of backscratching setup in New York as they had in Washington and Philadelphia.

The Court: The point I am wondering about is this: If this is a nationwide situation, why are we restricted to damages in the New York area?

You say it is the New York area in which you were damaged. Weren't you distributing pictures for exhibition all over the country?

Mr. McGovern: We were.

The Court: What happened in the rest of the country? Did you get a fair break?

21 Mr. McGovern: We don't have the same degree of knowledge as of this moment as to what happened to us in the rest of the country, and only because of the fact that we did not have access to interrogatory type of information, but we certainly feel we were injured across the country. This had the effect of reducing our total national film rental in the country at large.

The point I tried to emphasize earlier, Judge Dawson, is the New York market is really the crucial market in this country and in the world.

I want to go into the Paramount case. The Paramount case does deal with a nationwide conspiracy across the country. There is one exception to that and that is this situation here. The only local market dealt with in the Paramount case was this New York first neighborhood run metropolitan market.

The Court: There was a particular finding?

Mr. McGovern: There was a particular finding as to that. There had to be in order for the Court to go ahead and decree divorcement against Loew's. Most of Loew's holdings are in this area I described a moment ago.

22 I might just come to that directly and indicate to you precisely what portions of the Paramount judgment we think are particularly pertinent.

The Court: We will come to that. At some point you are going to offer that?

Mr. McGovern: Yes.

The Court: Let us wait until that and get it in at that

time in the trial, because I would like to get that in its logical place in the trial. I am generally acquainted with the Paramount decree but not acquainted in detail.

Mr. McGovern: I will pass that reference to the Paramount case at this time, your Honor, and content myself with pointing out again there is this particular finding, Section 154(d), that specifically deals with the very conspiracy we are charging in this case.

Our tender of proof, your Honor, will go to the proposition that the finding in the Paramount case on which we will initially rely by the terms of that decree, as your Honor undoubtedly knows, refers to the year 1945, but the tender of proof on our behalf will initially go to the proposition that between 1946 and 1950, the period
23 of time covered by our damage claim here, precisely the same conspiracy that the Court found in this metropolitan area as of 1945 continued right down.

The Court: You will show proof of that?

Mr. McGovern: We will show proof of that, yes.

The Court: You will show what happened to your client in that period?

Mr. McGovern: We will certainly undertake to do that and, I trust, to your satisfaction, Judge Dawson.

The Court: How many other independent distributors similar to Eagle Lion were there at that time?

Mr. McGovern: I would say two others: Monogram and Republic. In fact, we were the three independents who were in the Paramount case, and, as far as I know, there were only those three.

Coming to the actual measure of the impact of the conspiracy on us, as I pointed out, we will show the continuation of the conspiracy by independent evidence before the Paramount judgment during the period of damage for which we are suing.

We also, of course, point out that the relief
24 which was decreed in the Paramount case did not become effective until after the damage period for which we are suing.

So that whatever benefits were supposed to inure to the independent distributors, your Honor, as a result of that decree were not realized until after the damage period involved here ended.

Now, because of that fact, it is obvious that we did not have any experience outside the conspiracy. All of our experience in distributing motion pictures operated under this conspiratorial umbrella. So that we are compelled and entitled, I think, to fall back, then, on the result of the big Loew case to the best available evidence, which is a comparison of our own performance data in the field of the alleged conspiracy with that of the defendants themselves, and what our testimony will undertake to show is that during this period of time from 1946 to 1950, taking our own national gross rentals, not theirs, mind you, but taking our own, which I point out were themselves diminished as a result of the nationwide conspiracy, but taking our own national gross rentals we will undertake to show that during this period of time we derived from this New York metropolitan first-run area about 6.4 per cent of our total national gross absent the New York metropolitan area, whereas the defendants during the same period of time were taking out of New York on the average 8.9 per cent of their total national gross.

It is our contention that this is the only fair and valid measure we can use as a yardstick to determine what the impact of the conspiracy upon us was, because we had no experience either before the conspiracy or after the conspiracy and were remitted to using the only yardstick available there.

We will also contend, your Honor, that the situation, which I have described and which we will prove, caused us such loss that we were finally forced to our knees and out of business.

We will allege loss of prospective profits by what we allege was the forced sale to United Artists, and those

two items taken together constitute our major proof of damage.

The Court: Thank you very much.

Do you wish to make any preliminary statement?

26 Mr. E. Raftery: Yes, your Honor, I would like to make a few opening remarks.

First, your Honor, as to the question of what other independent distributors were handling pictures in this area: Mr. McGovern answered Republic and Monogram. They were in business all during the period and they are still in business. That is that.

He overlooked, however, telling you the most important independent distributor, a former defendant in this action: United Artists Corporation. That company was formed in 1919, has never produced a picture, has relied entirely on independents and is still in business. In fact, as he said, they ultimately sold out what was left of this Eagle Lion shell to United Artists sometime in 1951 or 1952. However, we have got to look at the picture.

I did not recognize the picture that Mr. McGovern painted. First of all, he keeps talking about the defendants taking 8 per cent as against 6 per cent. Mind you, the defendants in this case have taken nothing. What he is referring to is the former defendants in the action, the distributors. You had a group of distributors in this action in the beginning.

27 Now, it is these distributors that collected the film rentals from the Loew defendant and from the RKO defendant for the privilege of playing their pictures in our theatres.

In the beginning of this lawsuit I never could understand it: instead of asking for money damages against those distributors who took the money out of this area, they ask for no money damage against them but ask for money damages only against the theatres that had paid the money over to the distributors.

Now, his action, if he had any, in the beginning for

money damages should have been against the people who got the benefit, not against the people who paid out the money. When we got up to the trial before Judge Hand, he dropped them out completely and all we had left in it were the distributors—I mean the exhibitors.

Now he wants us, in addition to having paid millions of dollars in film rental to these eight distributors—and, mind you, when we get to the proof 30 different distributors furnished product to RKO during this period, not these three that he talks about or these four, but 30, in-
28 cluding his own client, Eagle Lion, Film Classics, Monogram, Republic, Columbia, every one of them.

Now, let us get back to the genesis of Eagle Lion. There was a company in business here for a number of years called PRC. I believe the initials, like NRA, had some meaning like Producers Releasing Corporation, but we were living in that initial period and everybody had to have initials, so PRC. They were known as a horse opera company. They primarily made these cheap westerns that generally were shown on 14th Street as part of either double or triple bills. Occasionally they would have a very elegant bank robbery picture, or what they used to call an action picture. Their negative costs ran $25,000, $30,000, rarely above that, many times below that. The picture was made many times, would be 4,000 feet in length and they would get 2,000 feet out of that from the libary.

By "library" I mean they had the horse running this way one day and the other way the next. They put it into a great, big, beautiful opus. That type of picture never saw the light of day on Broadway, never saw the light of
29 day in these so-called first neighborhood runs, but, as I say, 14th Street, and even 42nd Street did not play that type.

The Court: Between Seventh and Eighth Avenue?

Mr. E. Raftery: No.

The Court: I thought they played anything.

Mr. E. Raftery: They have gone very high class. In

fact, those very theatres between Seventh and Eighth Avenues, during this very period that we are litigating about, moved up into so-called first neighborhood runs, and you have the New Amsterdam, the Lyric or the Times playing day and date with either Loew's best house or our best house.

However, to get back, this Pathe Industries was in the printing business, laboratory business, sold raw stock—that is, the negative on which they photograph the picture—sold prints, and one of their customers was PRC. I don't know the legerdemain or the hocus-pocus by which it ended up with PRC finally being owned by Pathe Industries. I imagine it was just for debt.

Well, anyway, we now have Pathe Industries with a distributing company.

About the same time in early 1946 a contract was made with J. Arthur Rank, who is a producer of motion pictures in England. At or about the same time a contract was made between Rank and Universal. Universal was one of the defendants dropped out the window before Judge Hand.

The Court: Universal was another distributor, you mean?

Mr. E. Raftery: Yes. And Universal was an independent distributor.

The man Wanger, whose name he mentioned here a little while ago, was one of Universal's chief independent producers. So Universal made a contract with Mr. Rank at or about the same time.

Now, we have got on deposition a copy of the Eagle Lion contract with Rank, and as I gather out of that document the better Rank pictures—and, mind you, when you talk about foreign pictures in the United States, when you use the word "better" or you use the word "poorer," you use them both relatively, because in this market the so-called British pictures have not become popular generally, except on the Late, Late Shows on television; in fact, last night

Bob Hope's big crack was, "I made this picture in England and, in all probability, it is going to end up on
31 the Late, Late Show." That is the unfortunate thing. There are many British pictures, and very fine ones.

The Court: Where do the so-called art theatres fit into this category? Do they display separately or do they come as the third or fourth run?

Mr. E. Raftery: They generally play those pictures first-run in the metropolitan areas and only in a few cities.

For instance, in New York City, as I tried to point out in that short memorandum I gave your Honor, you have theatres like the Sutton, the Plaza—the Plaza recently gone completely art—the Fine Arts, the Translux; there are about eight or ten of them and they play these better British pictures.

The Court: As first-run?

Mr. E. Raftery: As first runs.

The Court: But they are not in this neighborhood run field at all?

Mr. E. Raftery: No. In fact, many of those first-runs in the art theatres, they may play there for weeks or months and they perhaps won't have six or seven more showings in the whole metropolitan area.

31a That is, one out in Kew Gardens, called the Austin, one down on lower Fourth Avenue, one out on Queens Boulevard—about a half a dozen.

32 The Court: Is that true through the rest of the country also?

Mr. E. Raftery: The rest of the country, outside of a few big cities, you don't have art theatres.

The Court: What happens to the pictures played in the art theatres in New York when they get out to the smaller cities?

Mr. E. Raftery: They remain in the cans in the exchanges. They don't even get into the theatres, most of them. They have tried, and don't think Universal hasn't tried, to popularize those pictures.

And I will give you a perfect example, this picture Marty.

The Court: I am thinking about that.

Mr. E. Raftery: Evidently our minds met. It came into my mind. That was a tremendous picture, that got the Cannes Festival prize. It played the Sutton Theatre. The big Chicago theatre, on the strength of its great success, tried to play it as a first run in the City of Chicago. They might as well have kept the doors closed as far as success was concerned.

33 The Court: But in all the smaller cities that played.

Mr. E. Raftery: Not in all.

The Court: Most of them; I thought numerous people had seen that picture in moving picture theatres throughout the country. How did it get there?

Mr. E. Raftery: But that is not an art picture. That is an American-made feature, made in Hollywood.

The Court: It got into the art theatres, though.

Mr. E. Raftery: In New York because whoever distributed it said it would be better distribution to put that type of picture, made in the old-fashioned 35 millimeter black and white—"Let us not try to buck Cinerama and Cinemascope, and these big Broadway things. We'll put it over in the Sutton Theatre," and they showed the wisdom of that distribution.

To get back to this inception of this company. It started off with what was left of PRC and the culls from the Arthur Rank Company, and they opened up exchanges. They didn't have to open many. They took over the PRC exchanges, wherever they had them, and they were mostly—

34 The Court: What are exchanges? Tell me what they are.

Mr. E. Raftery: An exchange is nothing more than a local branch office. In about 30 cities in the United States each of the top companies have a branch office. Over on

Ninth Avenue, I think it is 630 Ninth Avenue, New York, is a building called the Film Building. Even though United Artists has an office at 729 Seventh Avenue, that is the executive office, there is a branch office over in the Film Building.

The Court: What do they do in those exchanges?

Mr. E. Raftery: Here is the way it starts: In the exchange you have a branch manager who, in turn, reports to his district manager, who has under him a series of salesmen. He may have a salesman that covers from Queens County to Montauk Point, he'll have another one who covers Brooklyn, he will have another one who covers North Jersey, he will have another who covers Westchester, he will have one for the Bronx, one for Queens, one for Manhattan.

Those salesmen have a pad of contracts and they go out to each theatre. Mind you, in this New York City area, you got between six, during this period, you had been six and seven hundred theatres in this metropolitan area. That salesman goes out, and, let us say John Jones owns this theatre, and he will sit down with Mr. Jones and he will say, "I have a picture Marty, a great picture," and when the salesman gets through describing it, the combination of Gone With the Wind and four other pictures, he will immediately want 30 per cent of the gross, we will say, for the right to show that picture in that theatre. But the theatre owner, who is no babe in arms, will immediately start to discount and to bargain and trade.

The Court: Would that be true in these years with the, say Loew and RKO chains, or did they buy as a chain?

Mr. E. Raftery: They have to sit down with each of these distributors, and negotiate for their product, make a deal on their product. They sometimes bought for the whole circuit, they sometimes bought for a part of the circuit.

The Court: But in those cases the salesmen wouldn't go out to sell the individual Loew's theatre?

Mr. E. Raftery: He didn't go to the theatre it-
36 self. He would go to the man who acted as buyer for the local theatres. Let us assume that that buyer was Mr. Sherman, Mr. Pollon, Mr. Schwartz.

The salesman would come over to their office and he would say, "I got it. I can sell you one picture, I can sell you two, I can sell you three."

Mind you, Judge, the impression that Mr. McGovern sought to create, that there was some God-given right to RKO, that they, in perpetuity, had these pictures from these distributors, any one of these distributors: Let us assume we were buying Warner products from the RKO. The only pictures we had the right to show were those we had a commitment for, and only up to that. The day after, if Mr. Warner didn't like the color of Mr. Schwartz's hair, he could say, "I am going over and sell Loew's in opposition," who happens to be a competitor in this area, and I tell you the competition is terrific between these two circuits. And, mind you, the 17 theatres that our friend sloughed off so glibly, you have in this area the Brandt circuit, with over a hundred theatres during this period, you have the Randforce circuit, you had the Skouras circuit.

37 The Court: Were those first-run neighborhood theatres?

Mr. E. Raferty: Were or could have been, and many of them were—

The Court: Were they?

Mr. E. Raftery: Either were or could have been, depending on what that particular theatre wanted to buy and wanted to run.

We had no proprietary right or no contractual right or no under-the-table terms, even, that we got from Warner's, or Fox, or Universal, or Radio—a little different.

You must remember, during this period, Radio Pictures, up until '48, that is, and RKO Theatres were affiliated and under the decree in 1948 and continuing for one year after

November, 1948, under the decree of this Court, we had the right to show Radio pictures exclusively at any of our theatres under judicial decree.

The same applied to Loew's and the so-called Loew pictures. So we never tried to get Loew's or never tried to get Radio. We had them. That we admit.

But to come back to this quality thing, back to this
38 '46 period, and this is where real difference of opinion is between the two tables, in 1946 they opened up these exchanges, and that is where we got off on the other tack.

PRC already had physical offices in a number of cities but where they didn't have them, Eagle Lion opened some others, and they became a national distributor. They hired a man named Al Schwalberg as vice-president, I think his title was—titles are great in this business—vice-president in charge of domestic distribution, which means the United States, Canada, Hawaii and a few islands. So Mr. Schwalberg is in business—at least he thought he was. He had PRC and he had some culls from Rank. Schwalberg, I think, stayed there about a year or a year and—whatever it was, and he left, and then they brought in a new fellow to run distribution.

But, let us see: Mr. McGovern sounded the whole keynote of exhibition in the metropolitan area when he said that these distributors tried to get a first-run on Broadway of every picture. Now, it isn't only the best pictures that get a first-run on Broadway, but theatres like the Music Hall and the Capitol, and the State, and the Strand, in those days, it is now the Cinerama Theatre, the
39 Rivoli, the Criterion, the Globe, the Mayfair, the Victoria and the Astor—you had a pretty broad market that you could put in your pictures.

From the time they started in '46 until they folded tents and sold out to United Artists, out of 196 theatres that they list in this hocus-pocus they call their damage thing, they had 24, if my count is correct—either 23 or 24—which got a first run on Broadway.

They call this first neighborhood run. What we really are is second-run theatres but because we are located in neighborhoods, they say first neighborhood run. The pictures that any operator of a neighborhood theatre tries to get for exhibition in the neighborhood are the pictures that Mr. McGovern described, that have been publicized, and whatnot, and whatnot, and have the value of a first run in New York City.

There is no question that every Eagle Lion picture that had a first run in the Broadway area got an across-the-board first run, not only from the RKO theatres but from the Skouras theatres, or from any of the other theatres that play that type run.

He said, and to further bolster our argument,
40 the runs that follow the RKO runs or the Loew runs, they only want the pictures that have been publicized in the RKO neighborhood runs.

As regards the art pictures, and I admit I am a devotee of art threatres, I go to them a great deal—

The Court: So am I, but I guess they are out of this case.

Mr. Raftery: I think those can go out very quickly.

I think 34 per cent of the revenue that they got on their art pictures came out of New York City, I mean, 34 per cent of the whole nation.

Going to the third class of pictures they released—

The Court: I take it neither Loew's nor RKO ran any art theatres or did run any art theatres?

Mr. E. Raftery: The first company in this country ever to have an art theatre was RKO, the Cameo, on 42nd Street, and we didn't specialize in it after that. It is a specialty.

The Court: I realize that.

Mr. E. Raftery: You come to the third class of
41 pictures. They had a class of pictures that never saw the light of day in any of the Broadway first-run first-class houses, and that third class were mostly westerns and many of them were what we call westerns in series. They weren't fortunate enough to have Gene Autry, so

they could say, "We are selling 13 Autry's." They sold 13 horse operas, but I don't think—I don't think I would know even who played in them, and these 13 are part of them, saw the light of day in what we call so-called second-class Broadway first-run, which, in those days, there were three of them, were the Gotham, which is now the Holiday Theatre, gone back to be a legitimate theatre, I think the play "The Righteous Are Bold" is playing there right now, and then you had the New Yorker, that is the little theatre down on the site of the old George M. Cohan legitimate theatre, 43rd and Broadway, which is now a little house in back of Nedick's Restaurant; then you had the Little Rialto, which is on the site of Hammerstein's old Victoria, over there, you will remember, on the corner, at the northwest corner of 42nd and Seventh. It is a rather nondescript building, the principal part of which is an entrance into the subway, and they have this little theatre wedged
42 in. It has five or six hundred seats. That played a number, and so did the New Yorker, and so did the Gotham, so-called third-class.

The fourth class of pictures they had were what are known as reissues. Those are pictures that may have had a glorious past back in the thirties or early forties and had a full continental distribution, and now, there in '47, I think it was, or '46, Eagle Lion, to bolster up PRC and the Rank culls, made a contract with fellows like Eddie Small, who is a good producer, and they got about a half a dozen reissues.

Strange to say, on the figures furnished to us, those reissues did better business for them nationally than practically all of their so-called PRCs or the Rank culls.

A reissue never gets a first run on Broadway. In fact, the only reissue I know of in the past year or two was that of a first run in the metropolitan area at the Normandie Theatre, an art theatre, a picture called Camille, which was when Miss Garbo had good trade publicity.

That is the fourth class.

The Court: What you are saying, in effect, is that
43 any damages or losses that they had were occasioned, not by any combination or conspiracy in violation of the antitrust laws, but merely because their pictures weren't good enough to get into the theatre.

Mr. E. Raftery: That is right.

The Court: That is what the issue is.

Mr. E. Raftery: That plus one other thing. I think, instead of just—you see, we have been with Mr. Wright before, he is the champion paper case man in the business. We say that this is not a paper case. You cannot just come and wave a decree and say, "That's it."

We say the burden of proof is on them to come into this court to how they had quality merchandise and that as a result of discrimination or illegal acts they couldn't get quality merchandise. I say that issue of fact is more important than the alleged issue of wrong. If they had merchandise of quality, we would be in a very different position to argue today. That is the first proposition.

Secondly, on this same issue of quality, don't think that we ignored Eagle Lion. Every picture that they released,
of the 196, with the exception of reissues, which we
44 had already seen, and with the exception of some westerns in series which never played in these neighborhoods, we had a print brought to our projection room, and we had our trained men, our buyers, our bookers, our district managers, everyone look at that picture to see if it wasn't possible that we could play it; that in addition to those negotiations for pictures, we tried to get every picture we could get from all these independents, and when your Honor sees we played some 30 of them during this four-year period, not just one picture, two pictures, three, several hundred pictures from others than these that were supposed to have been frozen up.

Your Honor, I am not going into this Paramount decree thing. Mr. Gillespie is going to do most of that.

The Court: We will discuss that when we come to the decree.

Mr. E. Raftery: I say, on the facts set forth here, that the plaintiff cannot make out a prima facie case.

The Court: We will see.

Why don't we take a five-minute recess and then call the first witness?

45 Mr. Gillespie: I wonder if I might just have a word before—not before the recess, but —

The Court: All right, let us have it now.

Mr. Gillespie: Take the recess.

The Court: That is all right. I just thought we would have a recess between the opening statements and the taking of testimony.

Mr. Gillespie: I think it is somewhat presumptuous for me to ask for a word after the complete coverage of the entertainment field which my brother Raftery has made here. However, there are one or two points that came up in Mr. McGovern's opening and one or two items which, I think, perhaps, obtain more particularly to my client than perhaps to the RKO circuit, that I would like to bring to your Honor's attention in this opening.

The first thing that I think should be considered in this case very carefully is this subject of what is the first neighborhood run theatre.

Your Honor raised the point by a question that you asked of Mr. McGovern, "What makes a first-run theatre?" It is not the theatre, the bricks and the mortar, it isn't necessarily the management, but in this trade it is a theatre

46 which gets the first exhibition of a particular picture. That is all it is. That is what is a first-run theatre.

On Broadway we have houses sought after by distributors, as I understand the position of the plaintiff here. They concede that there is complete competition in the Broadway area, as I believe even the Government did in the case of U.S. v. Paramount.

What do we have here? We have a case dealing with what is called first neighborhood run. That, really, is second run; that is the run after Broadway.

Well, now, what makes a theatre a second run in New York or a first neighborhood run? It happens to be a house which exhibits a picture after its showing on Broadway and, as Mr. McGovern said, there are in this metropolitan area, which they have defined for the purposes of this case, some 600 theatres. And we will show your Honor, later on in this case, the number of other circuits beyond Loew's and RKO that exist in this area.

It comes to me in a very strange way to be here in this court and hear from the other side of this table the concern of a distributor. As I think we have indicated
47 to your Honor in our pretrial briefs here, this is the first case brought by a distributor. In U.S. v. Paramount we were hearing all the time about the great demand of the exhibitor, the theatre that wanted to get first run, and, as the Supreme Court said, that was the nexus of this case of U.S. v. Paramount, it was the disappointed exhibitor, the man who sought a first run, the man who sought a second run, who couldn't get it, the man who sought a first neighborhood run after Broadway.

It is strange, indeed, with that number of theatres in this great metropolitan area, other than Loew's and RKO, that with this great demand for product, or first neighborhood run, that these pictures, which we are told were of presumably comparable character, didn't find their way to some of these excellent theatres which said they were just as suitable as the Loew's and RKO circuits for the exhibition of films.

Now, these theatres, outside of the Loew and RKO circuit, are not located in outlying states. They are located all over the metropolitan area of New York. They aren't just art theatres. They are substantial-sized theatres.

The Court: First neighborhood or second
48 neighborhood or you mean all?

Mr. Gillespie: All of them—not all. Some are smaller, some are larger, but it isn't under the handicap of something that is in an outlying area. They are available here as are the Loew's and RKO theatres.

As your Honor perhaps knows from your Honor's own experience the Loew's and RKO theatres usually play two shows a week.

The Court: I never go to them, so I wouldn't know.

Mr. Gillespie: That disappoints me, and I am sure it disappoints my client, as it does Mr. Raftery.

The Court: I don't think I have been in a Loew's or RKO theatre for years. Only the art theatres.

Mr. Gillespie: You have missed something, your Honor. Those theatres have two changes a week.

The Court: I may say I see two, I think, two movies a year. So that is the reason I don't go in.

Mr. Gillespie: It is very clear you are approaching this case with complete lack of prejudice.

49 Well, to satisfy the customers who do go to those theatres, your Honor, these theatres have two changes of shows a week, as a rule, the Loew's and RKO circuits, and each of these shows has a double bill, which may be one reason your Honor doesn't attend as regularly as we would like.

The Court: Don't have the hours in the evening to sit through it.

Mr. Gillespie: Perhaps that is so, but there are others who have that time, thank goodness.

That means you have need of four films a week per circuit, and if you take that 52 weeks during the year, you run up easily to a need of 416 films a year.

There were in United States v. Paramount eight distributors, three of those who called themselves the independents and five others. During this period of time these companies were producing, say, roughly, say, 30 to 35 films a year. Let us take the larger amount, multiply that by eight, and you run up to 240, 250 films. I mention that because it indicates just a little bit why these circuits play the pictures of other distributors and why these

50 circuits, as every theatre, was trying to get a prior run on a good picture, if that was available. The

urge was there, and that was the urge that the Court was dealing with in United States v. Paramount.

As part of my opening, your Honor, there are just one or two other things I would like to refer to. Of course, we would take the position that the plaintiff must prove in this case that whatever decisions we made in respect of the plaintiff's films were made not independently by ourselves but, of course, in combination with RKO. They must prove that affirmatively.

Second, we feel there is no question that they must prove that the quality of their product was, at least, the same as ours.

Your Honor took the time to read the issues at the opening of this trial. I would like to just briefly refer to the first question again, for one moment. That question reads as follows:

"Did the defendants combine and conspire in violation of the antitrust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a com-
51 petitive basis feature motion pictures," and so forth, "Loew and RKO."

I would like to pause for just one moment on those words, "to exclude the plaintiff from the opportunity of licensing on a competitive basis." We agreed to that stated issue because of those words "on a competitive basis." We felt that that placed the burden on the plaintiff of showing that what he was offering was competitive with the other product available to the defendants Loew's and RKO.

There has been a great deal said here about the importance of first run. Mr. McGovern said that is the thing that builds up a picture, that is the thing that makes a picture of value, and Mr. Raftery echoed that.

Your Honor, Mr. McGovern also has made reference to these ratios, that they will prove that they got only 6.4 per cent out national gross from New York, whereas we got 8.9. Your Honor will find, as we get along here, that

these pictures that comprise the 8.9, these 96 pictures, which they use of ours for that purpose had an average first-run film rental in New York, on their own figures, of over $25,000, whereas their 196 pictures, on which
52 they arrive at their 6.4 per cent, show that there was first-run average rental of less than six thousand, one-quarter.

The Court: Do you say that they aren't averaging the right kind of pictures?

Mr. Gillespie: Exactly. They are nice apples and lemons. That is our position. You cannot. When you come in on an issue on a competitive basis, you must affirmatively show that you are dealing with Chesterfield cigarettes on one side and Chesterfield cigarettes on the other, the same quality merchandise.

53 Now, one of the classifications, of course, is this western classification. The figures will show, your Honor, that over the period of time 20 per cent of their 196 pictures were westerns.

Of our 96 you will find there were less than 3 per cent that were in that category.

The Court: I think I understand that. That will have to come out when you get to the proof.

Mr. Gillespie: There is one other thing on that quality classification. This is not only a matter of comparable times of pictures on both sides of the equation but also there are things such as star value and story value that go into this equation. I am not going to burden your Honor with it at the moment.

The Court: I realize that it will eventually come out.

Mr. Gillespie: There is a third category or a third point that the plaintiffs must establish as part of their prima facie case and that is that the defendants not only separately but in a combination and conspiracy refused to consider the plaintiffs' product.

Mr. Raftery has referred to how they have
54 screened it. We have done likewise.

They must establish, as I understand it, at least, that we accepted an arbitrary small number of their pictures. We showed actually 89 pictures of the plaintiffs in the course of some 196 in this four-year period.

They must show that we paid an unreasonably low rental in respect to the pictures they had. We will be able to show to the contrary, your Honor, on their statistics alone that that is not the case based upon the quality of their pictures.

That will give your Honor an outline briefly of what our position is so far as Loew's is concerned. Thank you for adjourning your recess.

The Court: I did not mean to cut you off. I thought Mr. Raftery was talking for both of you.

I think we will take a recess now. We will sit today until 12:30 and adjourn until 2:00 o'clock, and then sit until 4:30. That will be our general procedure.

(Short recess.)

The Court: Call your first witness.

Mr. Wright: If the Court please, we will ask to
55 have marked for identification as Plaintiffs' Exhibit No. 1 the final decree entered on February 8, 1950, in the Paramount case against Loew's, Inc. and others.

The Court: It is marked for identification.

(Marked Plaintiffs' Exhibit 1 for identification.)

Mr. Wright: I will ask to have marked for identification as Plaintiffs' Exhibit 2 the findings of fact and conclusions of law entered in the same case on the same date which are referred to in Plaintiffs' Exhibit 1 for identification.

(Marked Plaintiffs' Exhibit 2 for identification.)

Mr. Wright: I offer in evidence Plaintiffs' Exhibits 1 and 2.

Mr. E. Raftery: We both object to the introduction of them. No foundation has been laid for the introduction of

either. Further, they are incompetent, irrelevant and immaterial, and on the issue of irrelevancy I am going to ask Mr. Gillespie if he will make the argument.

The Court: Go ahead.

56 Mr. Gillespie: Your Honor, are you prepared to hear argument at this time?

The Court: Yes.

Mr. Gillespie: I join in the objection stated by Mr. Raftery.

Your Honor, our principal objection of relevancy to this decree in the case at bar is actually twofold, both aspects of this stemming from the fundamental proposition that the issue as defined in the case at bar was not litigated or determined in United States against Paramount.

The Court: If it was, would you say that these would be admissible?

Mr. E. Raftery: As to Exhibit 2, under no consideration. The findings of fact and conclusions of law are not admissible under any consideration. As to the first, if the issue were litigated and the impact had been shown—mind you, the facts in that are prior to 1946. At this point neither are admissible, but on the overall picture if they had established the impact, that is, the continuation of the facts shown in Exhibit 1, then on the question of irrelevancy we come back to the Court of Appeals decision in the Hillside case.

57 In the Hillside case, Judge Sugarman trying that case without a jury excluded the decree. The Circuit Court of Appeals affirmed only last June and said irrelevant.

Now, on irrelevancy we say that they are irrelevant here.

The Court: If they are irrelevant they should not be admitted, but the question is whether the Hillside case is the same as this case. I am familiar with the Hillside case.

Mr. E. Raftery: It is an entirely different case, your Honor. One has to do with runs and clearance and this

has to do with an issue that was never litigated, and Mr. Gillespie, I think, has the proof right here.

The Court: Let me ask you this: In the decree, the final decree, which is Plaintiffs' Exhibit 1 for identification, it says:

"The findings of fact and conclusion of law heretofore made are superseded by the findings and conclusions now entered in support of this decree."

Therefore, aren't those findings of fact and conclusions of law also admissible if the decree is admissible?
58 You have to have those findings to understand the decree.

Mr. Gillespie: Your Honor, our position would be, I think, on that score that those findings of fact and conclusions of law that were made in United States against Paramount read on that case and on the issues as presented there and that even though your Honor were to permit the decree in United States against Paramount to come in here, that the findings and conclusion would or might in many instances, if not all instances, read on issues that are different than is actually being litigated here.

For example, there are many findings in the United States against Paramount case which have absolutely nothing to do with this case at all. Those just couldn't come in even though the Paramount decree came in and we would argue that that is true of all of them.

Now, some of them might seem to have a little more bearing on this case than others, but I don't think that you can say categorically if the decree comes in that the findings come right in with the decree.

I think it would be necessary if the decree were
59 admitted for the plaintiffs to establish the relevancy and materiality of any findings that might be there.

Don't you agree with that, Mr. Raftery?

Mr. E. Raftery: I go further than that, your Honor. Under the Emich case, which, by the way, the Circuit Court of Appeals in Chicago disposed of completely by

granting General Motors summary judgment last year, Judge Clark in effect says how far these decrees may be admitted.

For instance, in a non-jury case such as this, to answer your Honor specifically, in order to understand the decree you have to look to the findings, Section—I will put it this way: But for Section 5 of the Clayton Act these decrees would never be admissible. Section 5 of the Clayton Act has really given us another exception to the hearsay rule and has permitted the introduction of the decree. It does not say the findings are admissible, it doesn't say the conclusion, it doesn't say the bill of complaint or anything else is admissible.

So we come down to the simple question that under Section 5, under this exception to the hearsay rule, which is a very harsh exception, because, as Judge Hand so aptly put it in the Government case—he said, "The use of these decrees as a substitute for evidence is crude, crude judicial stuff"—so we come here, we say assume the decree is admissible. Then I say to your Honor if your Honor does not understand any provision of the decree, he can send upstairs, bring down the whole Paramount record and examine any part of the record you want. That is what Judge Clark said you had the right to do in the Emich case.

The Court: I was told that once before and I tried to look at the record. It fills a room about half the size of this room.

Mr. E. Raftery: Judge Coleman said exactly the same thing in Baltimore when he was confronted with the same argument. He said, "I am not going to look at that whole record."

But in this particular instance let us assume you did admit the decree—and we feel confident that after you hear what actually happened before the statutory court on this very issue that is on trial here that you are going to exclude the decree—but assume that we are all wrong and you do let the decree in. We say if you do not

61 understand the decree you can look at any part of the findings in order to understand it, but that still does not make that hearsay document admissible in evidence under Section 5 of the Clayton Act.

The Court: Under the Emich decision, as I understand it, if the decree is admissible, then the Court may look at any of the papers or record or any other papers. That was a jury case, as I understand it, and the Supreme Court said that the judge could then charge the jury not merely on the basis of the decree but the decree in the light of all the record in the case.

So this being a non-jury case, if the decree is admissible certainly I would have the right to look at any other papers in the case to guide myself as to what that decree meant the same as I would have to instruct the jury if there were a jury here.

Mr. E. Raftery: That is correct.

The Court: Therefore, whether the findings of fact are technically admissible or the judge takes judicial notice of them is a matter of semantics, but the major problem we have here is whether the decree has any relevancy to this case.

Let me ask you this: Was it the final decree in
62 this case.

Mr. Wright: Yes, that is the last one. That decree did not, however, become final on that date. There was a subsequent appeal by Loew's and Warner's to the Supreme Court which was affirmed with that opinion in June of 1950, and then that decree became final when a petition for rehearing was denied in September, 1950.

The Court: I notice that this decree has in it a provision for permissible arbitration. Is that still in effect?

Mr. Wright: That was never put into effect, your Honor. That is a permissive—

The Court: Didn't the Court overrule something about arbitration?

Mr. Wright: There had been in effect prior to trial for a trial period an arbitration system under a consent

decree which had been entered into in 1940 which became indefinite before the case went to trial in 1945 and was never revived.

The Court: The provision in this decree in paragraph 6 says that the defendant distributors may file their consent with the American Arbitration Association and abide by the rules of arbitration and the right to set up an
63 arbitration system.

Wasn't that set aside by the Supreme Court?

Mr. Wright: No. There was no system set up in accordance with the permissive provision.

The Court: This, then, is the final decree in the case?

Mr. Wright: That is right.

Mr. E. Raftery: To further answer your question: That is the final decree as to Loew's. The final decree to our client was a consent decree entered in November, 1948, and which has not been offered.

The Court: This is the final decree as to Loew's.

All right, Mr. Gillespie, now tell me why it is irrelevant.

Mr. Gillespie: Your Honor, if I could, for a moment, I would like to make my position clear with respect to the findings. Even if your Honor should permit this decree to go in, and we think it should not go in, we believe it is still incompetent, before your Honor considers any of these findings or considers them for application in this case in any respect, they in and of itself must be be determined to be parallel with the issues here,
64 in other words, that a particular finding is in respect of the issues that are involved in this case.

The Court: If it is, then is this decree admissible?

Mr. Gillespie: I would say not. That is putting the reverse twist on it, in my judgment. I think you must make your decision on the basis of the decree, and if your Honor then turns to the findings in the case we would say that you must, before considering those findings for the purpose of this case, determine their relevancy to this case.

The Court: Let me ask you this: The provision in the Clayton Act provides final judgment or decree.

Mr. Gillespie: That is correct.

The Court: Aren't the findings of fact and conclusions of law part of the judgment? The decree says what shall be done, but where does the Court find, let us say, who is guilty or who is not guilty, who is liable and who is not liable, except in the findings of fact and conclusions of law?

I have understood that when a Court renders its findings of fact and conclusions of law, that might be the
65 judgment, and then the decree is that which is issued to carry that judgment into effect to say that so and so shall pay so much money or so and so shall be enjoined. Maybe I am wrong.

Mr. Gillespie: I believe those words "judgment" and "decree" were included for the purpose of possible criminal actions and things of that sort just to give alternatives. I don't think—

The Court: You don't think findings of fact and conclusions of law are a judgment? You may be right.

Mr. Gillespie: That is correct. That is our position. Although we haven't briefed it to your Honor, we can do so.

I believe there are holdings to the effect that the judgment applies only to the final order and does not include findings of fact and conclusions of law; but perhaps we are crossing that bridge before it is necessary, because, as your Honor said, the first business before us is determining whether this decree is admissible.

The Court: That is right.

Mr. Gillespie: I had just gotten to the point where I said that we felt there were two reasons basically
66 why this decree is not admissible here. The first of these is that the issue which has been defined here by Judge Ryan's pretrial order was not litigated or determined in United States against Paramount.

The second—and I will just refer to it now and speak to it in greater length with more detail in a moment—is that the time involved in U. S. against Paramount and as stated, incidentally, in the findings, is to a period prior to 1945, whereas we are litigating here 1946 to 1950.

Now, we say that this decree is not admissible here because the matter was not litigated in U. S. against Paramount, because U. S. against Paramount was basically a suit on behalf of exhibitors. We have stated in our brief that we filed with your Honor on this subject—we have referred to the Supreme Court's opinion, in which Mr. Justice Douglas made reference to the fact that this had to do with the cream of the exhibition business. All through the opinions you find statements by the Court to the effect that they are concerned about the independent exhibitor.

67 It was the independent exhibitor that the Court was looking after in U. S. against Paramount. It was the entire thrust of that case.

The Court: That may have been the important thing, but how do you explain finding 154(d), which says this: In New York City, Loew and RKO divided the neighborhood prior run products of the various defendant distributors under a continuing arrangement, so that there was no competition between them in obtaining pictures.

Now, that was a finding of fact which must have been a litigated finding of fact in the case.

If that is a fact which was litigated and the Court reached that conclusion, why isn't that admissible in this case? Why isn't it relevant, let us say, in this case?

Mr. Gillespie: Your Honor, in the first place, you are dealing here not with the distributors as the Court was dealing with in United States against Paramount. In that finding in United States against Paramount the Court was dealing with the distributors which were before the Court at that time; the eight that are involved here. There is no reference in that finding whatsoever that they were dividing the product of the independent distributors.

68 You have heard reference to Republic and Monogram by the plaintiffs here. There were many other distributors in addition to those distributors. So the Court was not dealing and the Court did not have before it the question of independent distributors and was not dealing with it in that finding.

The Court: That may be true, but you have here a finding that in New York Loew and RKO divided the neighborhood run product of the various defendant distributors.

Mr. Gillespie: Correct.

The Court: Which did not include this plaintiff—

Mr. Gillespie: Correct.

The Court: —under a continuing arrangement so there was no competition between them in obtaining pictures.

Now, if that is so, why isn't that relevant? Whether it is conclusive is another matter, but why isn't it relevant in this case?

Mr. Gillespie: Your Honor, we would say that the mere fact that it was found that the Loew's and RKO theatres divided the product of the eight major distributors
69 does not mean that there was no competition for the product of other distributors.

The Court: That may be true, but that is another fact. But on at least this fact which is established here, isn't it relevant to that extent.

Mr. Gillespie: The question here is: was the plaintiff excluded from the opportunity of licensing his pictures on a competitive basis to these circuits.

The Court: That is right.

Mr. Gillespie: The mere fact that these circuits had these pictures, of the eight major distributors, does not mean that this plaintiff here was excluded from licensing his pictures to those circuits.

The Court: If it did, it would not be merely relevant, it would be conclusive. The only issue I have got is is it relevant? Does it have some relevancy to the issues in the case, not is it conclusive, and lots of things may be relevant which are not conclusive.

Mr. Gillespie: Your Honor, I think I can say this, that the Court, in making that finding, was dealing with
70 the subject of the eight majors and was not dealing with the question of an outside distributor.

The Court: I understand.

Mr. Gillespie: Now, I think in support of that position we have got the fact that a specific attempt was made by the Government in 1950 to have embodied in this decree a provision which would restrain the exhibitor defendants from dealing with each other in any respect regarding a distributor's product. I did not have that information at the time we filed our little printed brief with your Honor.

Frankly, this case, as your Honor has said, is of great magnitude and it was four or five years—in fact, it is nearly five years ago now—and I just completely overlooked it, but it was brought to my attention.

This decree was entered on the 8th of February, 1950—

The Court: That may have some relevance in interpreting the effect of the decree, but it seems to me I still have the problem is this decree of any relevance at all in the case. If it is of some relevance, it seems to me it should be admitted.

71 Maybe you can explain it; maybe you can differentiate it and all that, but I have at the present moment is this decree of any relevance whatsoever, and it seems to me that in the light of this finding, which, under the Emich decision, I certainly have to take into account in interpreting the decree, I think the decree has some relevance.

I will therefore admit Plaintiffs' Exhibit 1 for identification in evidence for such use as it is or for such as it may be worth, and in connection with it I will, of course, give consideration to Plaintiffs' Exhibit 2 for identification, which is the findings of fact and conclusions of law concerning which the Court can take such judicial notice as it desires, it being a record of this court. I will therefore admit Plaintiffs' Exhibit 1 for identification, and you both have exceptions.

Mr. E. Raftery: Your Honor, before you go to that entirely, at this time we still contest the relevancy, because no evidence has been put on to show that the facts existed after 1946.

The Court: I realize that.

Mr. E. Raftery: Because the facts—

The Court: It establishes no more than the decree
72 and the record shows. Whether that is determinative of this case or whether it is merely background information is something which will come out in the course of the trial, but it has sufficient, let us say, historical relevancy, if nothing else, for me to admit it in evidence.

Mr. Wright: May I just say a few words to suggest why I think that 2 should also be admitted in evidence?

The Court: Do I have to admit that in evidence? It is a record of this court of which I can take judicial notice.

Mr. Wright: It is, I think, however, an integral part of the judgment. I never like to continue an argument after the judge has ruled in my favor, but there were a number of misleading statements that have been made inadvertently about the effect of the judgment.

The Court: All I am interested in is is there any particular reason why I should admit those findings of fact? If you offer them, why don't you have to offer all the testimony, and everything else in the case?

Mr. Wright: Because, I submit, the judgment
73 itself is meaningless without the findings. The statute which we say compels the admission of this judgment makes that judgment prima facie evidence of the matters which these defendants are estopped from relitigating with the Government.

The Court: You say the findings of fact are part of the judgment?

Mr. Wright: That cannot possibly be determined on the face of Exhibit 1. The only way that may be determined is by examination of 1 and 2 together, and that is why we say that they are both equally admissible and the minute they are examined together the statements which have been made here readily appear not to be so. That is, this was not only a conspiracy described in the findings but there was one which was explicitly directed against independent distributors, including PRC as well as against independent exhibitors.

The Court: I have said I will certainly take into consideration those findings in construing this decree.

Whether it is admissible in evidence or not I frankly do not know. I would be very glad if you would give me tomorrow anything that you may have to show that
74 those findings of fact are part of the judgment.

Maybe they are and maybe they are not. I am not certain on that, but under the Emich decision I can take into account those findings of fact and conclusions of law and also all the testimony, records, exhibits and everything, and since I am trying this without a jury I don't think I will go far astray on that.

So you may want to proceed. Do you wish to call a witness now?

Mr. McGovern: Whatever your Honor would like. We would like to proceed as expeditiously as possible, but we can take the 10 minutes after lunch.

The Court: Who is your witness?

Mr. McGovern: MacMillen.

The Court: We can at least have him sworn and a few preliminary questions asked.

William C. MacMillen, Jr.

called as a witness by plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. McGovern:

Q. Mr. MacMillen, would you state your present
75 occupation, please? A. I am president of Chesapeake Industries, Inc.

Q. And what is Chesapeake Industries, Inc.? A. We are a publicly held company with same 6700 stockholders.

Q. And is Chesapeake one of the plaintiffs in this suit? A. It is. The name "Pathe Industries" was changed to Chesapeake Industries after this suit was instituted.

Q. Would you state for the record the connection be-

tween Chesapeake and the other plaintiffs in this case? A. The other plaintiffs are wholly owned subsidiaries of Chesapeake who are engaged in the production and distribution of motion pictures.

Q. And would you give us a brief account of the experience of Chesapeake in the motion picture business? A. Well, in 1943 PRC Productions was created to produce low-budget pictures and PRC Pictures, Inc. was created to distribute those low-budget pictures.

Q. When and why, Mr. McMillen, if you know, did PRC stop producing and distributing pictures? A. Well,
76 in 1946 Chesapeake decided to make and distribute higher budget pictures and the production and distribution of the low-budget pictures gradually diminished and disappeared.

Q. What happened then to the PRC companies?

Mr. E. Raftery: Your Honor, I don't want to be captious. I don't think Mr. McMillen was even with the company during this period and I don't know whether he is just volunteering evidence that he knows nothing about.

The Court: That may be true, but if it is background I will allow it. If it is an essential matter, we can exclude it. If it is historical background and nothing else, I will let him testify from his general knowledge.

Q. Mr. McMillen, when happened, if you know, to the PRC companies? A. In 1946 PRC Pictures was dissolved and its distribution activities were assumed by the Eagle Lion Company and PRC Productions gradually became inactive.

Q. Which plaintiffs made and released these more expensive pictures? A. Eagle Line Studios, Inc. produced them and Eagle Lion Films, Inc. distributed them.
77 Q. Would you describe, please, the organization and business of the Eagle Lion companies? A. Well, in 1945 Chesapeake entered into a contract with the J. Arthur Rank Company. J. Arthur Rank was a producer and distributor in England. This contract provided, among

other things, that Chesapeake would produce a minimum of five pictures a year.

The Court: Is there a written contract?

Mr. E. Raftery: Sure there is a written contract.

The Court: I think the written contract had better speak for itself.

I think at this point we will adjourn for lunch. At least we have got the witness on the stand. We will reconvene at 2:00 o'clock.

(Recess taken until 2:00 p.m.)

78 AFTERNOON SESSION

WILLIAM C. MACMILLEN, JR., resumed.

Direct Examination continued

By Mr. McGovern:

The Court: You may continue.

Mr. McGovern: May we have these marked for identification, please, as Plaintiffs' Exhibits 3 and 4, I believe.

(Marked Plaintiffs' Exhibits 3 and 4 for identification.)

Q. Mr. MacMillen, I show you Plaintiffs' Exhibit marked for identification 3, which bears the caption "U.S. Agreement General Film Distributors, Limited, and Eagle Lion Films, Inc., dated April 18, 1947," and Plaintiffs' Exhibit for identification 4, which bears the caption "U.K. Agreement General Film Distributors, Limited, and Eagle Lion Films, Inc., dated April 18, 1947," and ask you if those are the agreements with the J. Arthur Rank Organization to which you referred prior to luncheon recess? A. They are.

Q. Would you read from those contracts, Mr. MacMillen, the pertinent provisions governing the number of pic-

79 tures to be distributed and the negative cost of each.

Mr. Raftery: That is objected to. The agreements speak for themselves. They aren't in evidence.

The Court: Do you offer them in evidence?

Mr. McGovern: If they wish, your Honor, I will offer them. I may say these were marked for identification back at the pretrial depositions, as Mr. Raftery knows. There is no purpose in encumbering the record, but I am perfectly willing to offer them.

The Court: Any objection to receiving them in evidence?

Mr. E. Raftery: May I see them?

Mr. Gillespie: Might we take a look at them? I did not participate in the examination before trial.

(A pause.)

Mr. Raftery: We have no objection to the two documents being marked in evidence with the right to either side to read such parts as they want to read.

The Court: If they are in evidence, even I may read them.

Mr. Raftery: Surely.

80 The Court: They will be received in evidence then.

(Plaintiffs' Exhibits 3 and 4 for identification received in evidence.)

The Court: If you want to read any particular part in the record, you may do that yourself. The witness doesn't have to do it.

Mr. McGovern: I just don't know where they are in the agreements. They are quite long, actually. We only have these two short passages.

The Court: I think it would be a good idea for somebody to read the passages that you have in mind into the record.

Mr. McGovern: May the witness do so?

The Court: Surely.

The Witness: In the agreement which pertains to the distribution of the pictures in the Eastern Hemisphere, the paragraph that you asked me to read is as follows—

Mr. E. Raftery: Let me get that straight. This is the contract, as I understand it, for Rank's company to distribute pictures made over here in England?

The Witness: In the Eastern Hemisphere.

81 Mr. E. Raftery: We will leave out England.

The Witness: That is not what—

The Court: Does that enter into this case in any way?

Mr. E. Raftery: I don't see how.

Mr. McGovern: I think it does, your Honor.

The Court: You think it does?

Mr. McGovern: What we really have here is a joint agreement between J. Arthur Rank and ourselves under which we agreed to produce five pictures for distribution in England and other territories, he agreed to produce five for us, and they are really joined together.

The Court: All right. You read what that says.

The Witness: "The American Company undertakes and agrees to acquire and deliver under this contract for distribution in the territory by the English Company during each twelve months period of the term hereof five motion pictures commencing January 1, 1947. The negative cost of each such picture shall be not less than $500,000."

The reciprocal clause in the agreement for the distribution of pictures in the Western Hemisphere, clauses,
82 rather, are as follows:

"From among the GFD pictures five features shall be selected during production or after completion for distribution by the American Company in the territory in each calendar year by a committee of three consisting of one representative chosen by GFD, Universal and the American Company respectively."

The Court: Who is GFD?

The Witness: They were the English Company, a Rank company, General Film Distributors, Ltd.

"The negative cost of the selected pictures to be delivered or delivered by GFD to the American Company hereunder shall be not less than £100 sterling per motion picture."

83 Mr. E. Raftery: Mr. McGovern, might I ask, is that the whole paragraph?

Mr. McGovern: No, it is the first couple of sentences, Mr. Raftery. I assume you are free to read the rest in if you see fit.

Mr. E. Raftery: Should we do it now.

The Court: If you think it is important to read it, why not read it into the record now?

Mr. E. Raftery: Did he stop with the word "Benjamin"?

The Witness: I read the first sentence.

The Court: What section is that?

Mr. E. Raftery: Article Second, A.

"No decision of that committee shall be effective unless it be unanimous. The committee, as presently constituted, is Messrs. J. Arthur Rank, Matthew M. Fox and Robert S. Benjamin. If the committee is desirous, there may be more than five features selected for distribution by the American Company in the Territory. All feature pictures selected by the Committee as above provided and any feature picture which has been rejected by Universal Pictures Company Inc. for general distribution under an
84 agreement of even date herewith and which is offered by G.F.D. to and accepted by the American Company for distribution under this agreement are hereinafter referred to as 'the selected pictures'.

"B. The American Company acknowledges its understanding that all G.F.D. pictures other than the selected pictures will be offered to Universal Pictures Company, Inc. for distribution and that Universal Pictures Company, Inc. will be obligated to accept a minimum of 12 motion pictures for distribution in the territory. It is understood that G.F.D. pictures not distributed in the territory by the American Company, will not be distributed in the United States Territory, Mexico, South and Central America by G.F.D. or any licensee under the trade-mark of 'Eagle Lion'."

Those are the two provisions.

The Court: All right.

By Mr. McGovern:

Q. Mr. MacMillen, how many years were those two agreements in effect? A. They were to run for five years.

Q. And did they? A. I believe that they were
85 terminated sometime during the fourth year.

Q. Now, what effect did the negotiation of those two contracts have upon the operation of the plaintiffs?

Mr. E. Raftery: I object to that. I object to the form of the question, what effect.

The Court: It is a rather general question. Can you pinpoint it a little more?

Mr. McGovern: Yes.

Q. As a result of these contracts, did the plaintiffs change their mode of operation? A. Yes.

Q. In what way? A. In September of 1946, Chesapeake created Eagle Lion Films to distribute the pictures under this contract and the pictures to be produced by Chesapeake under the contract, and in November of that year created Eagle Lion Studios to produce the required pictures.

Then the Eagle Lion Studio Company was put into funds and took over the production facilities of the studio in Hollywood and a million and a half dollars was spent to put it in condition to make these pictures.

86 Mr. E. Raftery: I move to strike the answer. He said in 1946 they did all this million and a half dollar stuff. The contracts, as I get them, are dated April 18, 1947. Isn't that the date, Mr. McGovern?

Mr. McGovern: That is the date.

By Mr. McGovern:

Q. Mr. MacMillen, will you please explain that difference in date, please? A. Yes. The agreement with Mr. Rank was actually reached late in 1945, but the documents were not formally signed on the date indicated in the contract, which is 1947.

Q. Now, Mr. MacMillen, when did you first become personally associated with the motion picture operation of

these plaintiffs? A. Well, in 1946 I was assistant secretary of Chesapeake and general assistant to Mr. Robert Young, who was the largest stockholder of the company, and as assistant secretary I generally was familiar with the implementation of the Rank agreements and by the end of that year, the end of 1946, the motion picture investment of the parent company was very substantial and I was
87 generally familiar with that investment.

Would you set forth the date when you first became connected with these motion picture operations in a managerial capacity? A. It was in the summer of 1948.

Q. And what was your connection with those film companies at that time? A. I was elected a vice president of Eagle Lion Studios and vice president in charge of operation of Eagle Lion Films.

Q. At the time you first became associated with the production company, how was production handled at the studios? A. Well, Mr. Arthur Krim, who is president of both of the Eagle Lion companies, was responsible for the decisions at the studio, that is to say, he made the final decisions as to the selection of stories, script, budgets, casting, and while a consultation was had with the sales organization of the distribution company, the final decision in these matters was his.

Q. And when you first became associated with the operation of these motion picture subsidiaries in the summer of 1948, what was the program policy of the studios?
88 A. Well, the policy was to make largely the more expensive pictures, but the studio was still making some westerns and some low-budget pictures.

Q. How was the Eagle Lion production program financed at that time? A. Well, originally we had financed all of the product ourselves, but about this time, or shortly before this time, a modification of that policy had taken place and we began to participate in the financing of certain pictures and, also, we began to lease the studio to independent producers to make pictures there which were distributed by the Eagle Lion distribution facilities.

Q. Now, when one of your pictures was ready for release, how was its distribution handled?

Mr. E. Raftery: I am going to object to this witness testifying solely from general knowledge. As I understand it, he had absolutely nothing to do with the sales or distribution at any time from 1946 to 1948 and even after 1948.

The Court: You were a vice president of those companies?

The Witness: I was vice president in charge of operations from the summer of 1948.

89 The Court: I think this is a preliminary question. I will allow him to state from his general knowledge how it was handled.

Mr. E. Raftery: But we won't be bound specifically unless they produce a witness who knows something about the actual distribution.

The Court: It depends on how important it is. When we get to the important part of this case, naturally we are not going to take anything except direct testimony. This, I understand, is background testimony. We will go ahead.

You may answer the question.

A. The finished print would be sent from the studio company to the distribution company whose headquarters were in New York. The picture would be screened for the sales staff and the other executives. The sales policy would be established, an advertising budget would be established and the number of prints to be ordered would be established and the prints would be ordered.

Q. From what source, Mr. MacMillan, did Eagle Lion Films derive its income primarily? A. From commissions from the sale of pictures which it distributed, and

90 these commissions were based on an agreed percentage of the film rental which the picture had realized.

Q. Would you describe what you mean by the phrase "film rentals"? A. Film rentals were license fees which

were paid by theatre operators to the distribution companies for the right to exhibit the pictures which the distribution companies were handling at their theatre or theatres.

Q. And at this time who determined the distribution policy for these Eagle Lion films? A. Mr. Heineman was the vice president in charge of sales of the company and he, with the sales staff, generally made that decision.

Q. At this period what type of a distributing organization did Eagle Lion have? A. Well, we had, like the other distributors, branches in 31 cities around the country, and the branches were staffed with a complement of salesmen and bookers, the usual group.

Q. After the distribution policy was set up by Mr. Heineman as you have indicated, how was the physical distribution of the films handled? A. Well, the branch officers
91 would be advised of the sales policy, they would be advised of the release date in their particular branch, they would be advised of the advertising policy and the number of prints that they would receive, and the salesmen in the branches would then attempt to make contracts with the theatres within their territories.

When the prints arrived, the contracts would begin to be honored, the print would be shipped to the theatre, the pictures would be exhibited, the print would be returned, the theatres would be billed and the fees would be collected the film rentals would be collected.

Q. How long would one of these films distributed in the manner you have described be in release before its value was pretty much exhausted?

Mr. E. Raftery: That is objected to.

The Court: Isn't that a pretty general question? It would depend on what kind of a picture it was.

Mr. McGovern: It may well be. Mr. MacMillen was the vice president of the distributing company and production company. He was the officer in charge.

The Court: You cannot ask him how long gen-
92 erally a picture would be available. It is like saying

how long will a man live? It depends on the man. I don't know whether you can take an average as being worth anything.

Q. In terms of your experience in distributing film in this period about the summer and fall of 1948, Mr. MacMillen, what did your own records indicate was the length of time that a picture would take to realize, let us say, 90 per cent of its gross national rental?

Mr. E. Raftery: That is objected to. The records speak for themselves. If he has records that will show, let him produce them.

The Court: Let me see if I can understand what this question is. You are asking this witness how long on an average it took for a film to produce through film rentals its cost of production?

Mr. McGovern: No, how long before it exhausted its release value so it was no longer available for exhibition, and this is a commonly, ordinarily accepted fact. In the industry there is no mystery about it.

I think Mr. MacMillen is in a position, in view of his experience, to estimate how long a picture would
93 be in release before it had exhausted all its possibilities for exhibition around the country.

The Court: How long before nobody would want to show it?

Mr. McGovern: Exactly; on the average.

Mr. E. Raftery: That is pure speculation and no background has been established for this witness. He has never distributed a picture himself.

The Court: Well, I am hearing this without a jury. I will let the witness give his testimony, if he wants to. I must confess it does not seem to me to mean very much unless it is backed up with specific cases. I should think some pictures would have a much longer good life than other pictures and averaging them all doesn't prove anything very much.

But the witness can answer. I will take the answer.

You may answer.

A. From our experience in our company we found that ordinarily at the end of a year we had received about 90 per cent of the film—domestic film—rental which we ultimately received, and by the end of 18 months we had received substantially all of the domestic film rental
94 which we were to receive on that picture, although from time to time some pictures did have a longer play-off and moneys did come in after that period.

Q. But in general after about 18 months your experience was, in the case of the Eagle Lion Films, you had about 90 per cent of your gross national rental? A. In a year we had 90 per cent of it.

Q. When you became vice president of these Eagle Lion companies in the summer of 1948, as you testified, were those companies operating at a profit? A. They were not. They were sustaining substantial losses.

Mr. E. Raftery: I object. The books are the best records.

The Court: Overruled. The vice president can tell whether they are operating at a profit or at a loss. Most vice presidents can, anyway.

Q. You say that the companies were operating at a substantial loss at that time? A. They were.

Q. Let me ask you, did you cause an analysis to be made of the nature of those losses and why they
95 were being suffered? A. I did.

Q. And what did you find out?

Mr. E. Raftery: That is objected to.

The Court: Overruled. I will take it.

A. We made a general examination of each of our pictures in each of our branch offices and we found, in comparing our branch offices with the actual moneys they were taking in on our pictures with what they should have been taking in, that there was a substantial discrepancy that existed in the New York branch.

By the Court:

Q. What do you mean "what they should have been taking in"? A. Well, we knew generally the percentage of

the national gross revenue that came out of each branch office throughout the industry. We compared that percentage that we were taking out of each branch office of our own gross receipts, national gross receipts out of each branch office, with what the rest of the industry was taking out of each branch.

Q. Were the figures of what each company got out of each branch public so that you would know what each company got out of each of its 31 branches? A. The
96 ultimate figures were not published but the percentages were published in the Film Year Books and generally available.

Q. Of the branches? A. Of the branches of the whole industry.

Q. But not of each company? A. Not company by company, but by the industry. And we compared what we took out of New York, out of all of the branches, with what the industry was taking out and generally we were taking out about the same percentage excepting in New York.

Mr. E. Raftery: I move to strike it.

The Court: I will take it.

Mr. E. Raftery: On the further ground, your Honor, that he says his source of information was some Film Year Books, which is nothing but trade publications.

The Court: I will let you cross examine on that.

Q. You have indicated that your analysis showed that you were taking less out of your New York area than you thought you were entitled to.

The Court: Strike out "entitled to." I don't think anybody is entitled to take any revenue out of
97 every place.

Mr. McGovern: Let me rephrase that, if I may.

The Court: It is not a question of what they were entitled to. It is a question of what they should have been receiving if properly run or something like that.

Q. You indicated you were taking out of the New York area less than in your judgment the average motion picture

distribution company did take out in terms of your respective national grosses. Did you analyze the situation with regard to the first New York run in that respect? A. Yes.

Q. And what did you find was the case there? A. Well, in the first New York run—

Mr. Gillespie: Your Honor, I hesitate to interrupt again, but I heard the words "average motion picture company."

Now, I think that every one of these eight companies is different that is involved here. I just cannot understand a question that is based on the average motion picture company.

The Court: I think you will have a good ground
98 for cross examination, but let me get what this witness has in his mind, anyway, about this. I think you can certainly cross examine a great deal on that, but I am going to ask the reporter to read that question.

Mr. Gillespie: I hate to interrupt.

Mr. G. Raftery: Your Honor, for the record, may I have the question reread?

The Court: I am going to have it reread.

Will you read the question, Mr. Reporter.

(The reporter read the question as follows:

"Q. You indicated you were taking out of the New York area less than in your judgment the average motion picture distribution company did take out in terms of your respective national grosses. Did you analyze the situation with regard to the first New York run in that respect?")

Mr. G. Raftery: If your Honor please, for the record, the defendants raise an objection primarily on the conclusory factors contained in the question. There is absolutely no basis or foundation of fact, fancy or figure which would permit the witness to give an answer. If he can answer that question in the manner in which it
99 is put here—I respectfully submit it not only should be reframed but let us get down to the subject matter that he is talking about.

The Court: You dropped that sentence in the middle. You said if he could answer that question— Were you going to add something? What were you going to add there, if he was an expert, or what?

Mr. G. Raftery: I don't know whether he is or not, if your Honor please.

The Court: Your objection is overruled. I will let him answer it and you can cross examine.

You may answer the question.

A. Yes.

Q. What did you find with regard to the first-run New York situation, Mr. MacMillen? A. We found that we were taking about the same percentage of our national gross out of the first-run New York as we understood that the industry was taking out of New York.

Mr. G. Raftery: May we have that part stricken, what "we understood," if your Honor please?

The Court: No, I will let that stand.

Go ahead.

100 Q. Where did you find the deficiency in your New York take was? A. We found that it was in the subsequent or neighborhood runs.

The Court: In all subsequent runs or just in the first neighborhood?

The Witness: In everything that followed the first exhibition in New York.

By Mr. McGovern:

Q. Mr. MacMillen, will you describe to the Court what the normal play-off is in the New York metropolitan area after you come off the first New York or Broadway run? A. After you come off the first run in New York, you normally play the first so-called neighborhood or first subsequent runs, which, in that branch in that territory, was comprised of two chains of prominent theatres and some 17 independent theatres. After you played the first neighborhood or first subsequent run, you then played the

second, third, and fourth and so on down the line until you had exhausted as many of the possibilities as you could in that territory.

Q. And at this time approximately how many pos-
101 sibilities were there in New York, if you played down through that neighborhood run slot you have described? A. Well, if you eliminate the first runs, there were probably some 700 or 800 in the aggregate.

By the Court:

Q. How many first-run theatres would you compute there were at that time? A. Well, there probably were, I would say, 40 theatres which customarily played pictures on their first exhibition in the territory served by the New York branches.

Mr. McGovern: Are we clear, your Honor, as to whether that question goes to first New York or first neighborhood?

The Court: I was asking about first New York.

The Witness: That is what I was answering.

By the Court:

Q. Then how many theatres would you say were in the first neighborhood run in New York? A. There were some 65 or 70 which were part of either the Loew's or RKO circuits and then some 17 others which were not operated by either Loew's or RKO but which were first neighbor-
hood run.

102 Q. Now, Mr. MacMillen, what did you discover as to the nature and the ownership of these two circuits, the RKO and Loew's circuits, that you have adverted to? A. One of the circuits, of course, was owned by, or operated by RKO and one by Loew's, and we found that they booked customarily each—all the theatres in this circuit as a unit. We found also that the practice was for the 17 independent first neighborhood run theatres to play the same pictures that were played at the same time as either RKO or Loew's was playing.

We found that this practice of booking the RKO and Loew circuits as a unit meant that if you couldn't contract for all of the RKO-Loew's circuit that you ordinarily couldn't get to play any of the theatres controlled or operated by Loew's or RKO.

Q. Have you had a chart prepared to show the theatres in these two circuits in the metropolitan New York area? A. Yes.

Mr. McGovern: I ask to have this marked for identification.

(Marked Plaintiffs' Exhibit 5 for identification.)

Q. I show you, Mr. MacMillen, what purports to
103 be a chart, it is marked for identification Plaintiffs' Exhibit 5, which is styled "First and Second Neighborhood Run Theatres Operated By Loew's and RKO Circuits in the Boroughs of Manhattan, Brooklyn, Bronx and Queens," and ask you if that is the chart you have referred to. A. It is.

Q. What was the data on which that chart was based, Mr. MacMillen? A. The data for the years 1946 through 1950 were based on the responses to the interrogatories in this case; and the data for 1945 were based on the exhibit. I understand it was called, RKO-4 in United States v. Paramount case.

The Court: These blocks indicate the number of theatres owned and operated by Loew's and RKO?

The Witness: The top line indicates—that is right—by year, the blue, the number of theatres operated in the first neighborhood run in the four boroughs by RKO, and the red by Loew's.

The Court: I see. I don't have that color.

Mr. McGovern: I am sorry. The photostats don't have color.

The Court: What are you offering in evidence,
104 the chart with the color on it?

Mr. McGovern: No, I am afraid we have to offer

this one, sir. We will have to mark it on here somehow.

A. (Continuing) It shows that during this period, 1945 to 1950, there were approximately 90, 91 theatres that were operated in the first neighborhood and second neighborhood runs by RKO and Loew's in the four boroughs.

Q. Mr. MacMillen, did I understand you to say that the data shown on the chart for the years 1946 through 1950 were based on the interrogatory answers by the RKO and Loew circuits in this case? A. Yes, that is what I understand.

Q. You indicated, did you, that the data shown on the chart for 1945 were based upon RKO Exhibit No. 4? A. Yes, in the Paramount case.

Mr. McGovern: Mr. Raftery, have you produced RKO Exhibit No. 4?

Mr. Raftery: Never had it.

The Court: Let me see this. Is there any dispute about these figures as to the number of theatres in those years?

Mr. McGovern: I just cannot believe that there 105 is, your Honor.

The Court: Don't answer me now. Think it over overnight, and if there is no dispute about it, I don't see why we need elaborate testimony.

Mr. McGovern: Very well.

I ask to have this marked for identification.

(Marked Plaintiffs' Exhibit 6 for identification.)

Mr. McGovern: Could I substitute one in which we have written in the names of the circuits under the bars for the one I gave you? I think that would be clearer.

The Court: It is just marked for identification?

Mr. McGovern: That is right.

Q. Mr. MacMillen, I show you Plaintiffs' Exhibit for identification 6, which purports to be four maps of Manhattan, Brooklyn, Bronx and Queens and bears a little notation in the upper righthand corner, "Exhibit United States District Court, Southern District, November 1,

1945," and ask you if you can identify that exhibit? A. I don't think I can identify it excepting that is what it says.

106 Q. Is that the exhibit that you referred to earlier as RKO No. 4 on the basis of which the data shown for the year 1945 was predicated? A. Yes, it is.

The Court: Let me ask you this. In this case there is some indication, apparently, that the New York metropolitan area is something other than Manhattan, Brooklyn, Bronx and Queens. Are you simply concerned here with these four boroughs or are we concerned with an area which is different from that?

Mr. McGovern: We are concerned, your Honor, with an area that is slightly different. It is an area we have defined in the complaint and that, in terms of interrogatory answers, was defined by agreement amongst counsel. It is an area in which the RKO and Loew circuits ordinarily enjoy their first neighborhood clearance over competitive theatres.

The Court: All I am asking is whether this chart, Plaintiffs' Exhibit 5 for identification, covers that entire area or all the theatres in that area?

Mr. McGovern: Yes.

The Court: Or are there other neighborhood theatres in the area that are not down there?

Mr. McGovern: There are some other theatres in
107 the area that aren't on there. We will advert to that shortly in the testimony.

The Court: All right.

Mr. McGovern: But the showing on the chart for 1945 is based upon a definition of first neighborhood run area that was used by the Court in the Paramount case, and we have merely agreed, in terms of interrogatory answers, to keep the area the same for the next five years.

Mr. Gillespie: Excuse me. I didn't quite follow your last statement. You said "we agreed to"—you were referring to us—agreed to keep the area the same?

Mr. McGovern: I am referring to your predecessor, Mr. Gillespie. He defined with us the area that would be covered by the material to be supplied in answers to the interrogatories.

Mr. Gillespie: I beg your pardon. In other words, the metropolitan area.

Mr. McGovern: That is right. In other words, Judge Hand didn't find the metropolitan area, he merely found a conspiracy in the neighborhood first-run in the metropolitan area. We had to agree amongst ourselves what that would cover in terms of area.

108 I ask to have these marked for identification.

(Marked Plaintiffs' Exhibits 7 and 8 for identification respectively.)

Mr. Gillespie: What was 7?

Mr. McGovern: I am going to offer 7 and 8 both.

By Mr. McGovern:

Q. Mr. MacMillen, I show you now what has been marked for identification as Plaintiffs' Exhibit 7, which bears the legend, "Eagle Lion Films, Inc. License Agreement," dated 4/7/48, and Plaintiffs' Exhibit for identification 8, which bears the legend, "Eagle Lion Film License Agreement," dated January 19, 1948, and I ask you what those exhibits are? A. 7 is a contract for the exhibition of two pictures distributed by Eagle Lion Films on the Loew's circuit and indicates on its face the film rental to be paid, and on the attachment the list of theatres in the Loew's circuit which Loew was privileged to exhibit those two pictures.

Exhibit 8 are some typical contracts—

Mr. E. Raftery: I object to "typical." Let him tell what it is.

The Court: Yes.

109 This first one here was the one which was dated April 12, 1948. Is that the exhibit you were referring to, Exhibit 7?

The Witness: The first one was dated, on my copy, April 7, 1948.

The Court: I don't seem to have the same date. Oh, I see. It was April 7 at the top.

The Witness: Yes, up in the upper righthand corner.

The Court: Oh, I see. There was a date down at the bottom.

This was a contract between—

The Witness: Loew's—

The Court: Eagle Lion Films and Marcus Loew Booking Agency for the exhibition of—

The Witness: T Men and Out of the Blue, two motion pictures.

The Court: One is marked as a booking agency. What was the Marcus Loew's Booking Agency?

The Witness: I don't know what their corporate structure was; agency, I think, but they were the people you sold pictures to if you wanted to play on the Loew's circuit.

The Court: This listed the theatres where it was
110 to be shown?

The Witness: Yes.

The Court: Does it show the run, or the number of days?

The Witness: That is right. The terms are on the front, on the face of the schedule, under the title, "Terms of show." "The clearance, as indicated down below, is as hereinafter submitted."

The Court: This was a percentage arrangement for this distribution?

The Witness: It was percentage—well, this was actually a combination of a percentage and a flat. You see, they were to take the first $310,000 gross and we were to take the next eighty, and beyond that it would be split fifty-fifty.

The Court: Was the gross for the entire chain?

The Witness: That is correct, not—

The Court: Not by—

The Witness: (Continuing) —by theatre, right.

By Mr. McGovern:

Q. Mr. MacMillen, would you undertake to describe what Plaintiffs' Exhibit 8 for identification reflects? A.
111 You have handed me several contracts which were typical contracts that we entered into with RKO.

Mr. E. Raftery: I move to strike out "typical."

Mr. McGovern: Very well.

Mr. E. Raftery: We know what the contracts are.

The Court: I will allow it in. If there is any question about it, why, we can clear it on cross-examination.

Mr. E. Raftery: I am trying to shorten the cross.

The Court: I know, but here are form contracts, apparently, and I think he can describe them as typical.

Q. Would you describe any one of those contracts, Mr. MacMillen? A. Well, the top one is dated January 19, 1948 and is an agreement to exhibit the picture Green for Danger on the RKO metropolitan circuit for a flat—it says a flat rental of $10,000—to play the entire RKO metropolitan circuit, and the theatres—five to seven days—and the theatres are listed again on the lefthand side.
112 Those are the theatres in which the circuit was privileged to play the picture.

The Court: All right.

By Mr. McGovern:

Q. Mr. MacMillen, what impact on your operations did access to the RKO Loew's circuits have?

Mr. E. Raftery: I object to that.

The Court: I think he has already said if he couldn't sell for those circuits he was going to have a very hard time selling anywhere in the metropolitan area. Anything more you need on that?

Mr. McGovern: The only other question I had is whether or not in the light of the contracts that we have just put in the witness can add anything to it in terms of the kind of play he got on the circuits and the result of his operations, but he has, I think—

The Court: That would have to be developed in particular cases. Now we are getting down to specific things. I wouldn't allow a general question like that.

Q. Mr. MacMillen, what happened to your product if you didn't succeed in selling either the RKO or Loew's circuit?

Mr. E. Raftery: I object to it. How do we know
113 he made an effort to sell?

The Court: That may be developed on cross-examination. I will allow the question.

A. As I have previously described, the second runs normally took the pictures that played in the preferred positions on the two circuits and the third runs from the second and so on. The result was that if you didn't get—if you got a contract to play in a preferred position on either the Loew's or RKO circuit, you were virtually blocked in throughout the entire subsequent-run territory, whereas, if you failed to get the preferred position on either the Loew's or RKO circuit, you were substantially blocked out throughout the subsequent-run territory.

Q. What did you learn at this period of time about the way the product of the distributors was handled by the two circuits? A. Well, I learned they arbitrarily divided up the product of the distributors—

Mr. E. Raftery: I object.

A. (Continuing) —amongst themselves.

The Court: That is stricken out. You have to have some more proof than that.

Let me ask Mr. MacMillen a question: Why should
114 a second-run neighborhood theatre be described as second-run or third-run? Is it the size of the theatre, or is it because they got the pictures later on?

The Witness: The definition is within a given neighborhood—if you look at it as a given city, where a first-run would play in the so-called first-run neighborhood run theatre, then after the usual clearance period, the picture becomes eligible for play on the so-called second neighbor-

hood run, or a circuit running a series of theatres. It would be the second time it was exhibited. Normally at the same day and for the same series of days, the same picture would be played on the second-run theatre. Then you go down to the third.

The Court: The second-run theatres are not owned by the people who own the first-run theatres?

The Witness: As a—

The Court: Some of them are and some aren't?

The Witness: Precisely.

The Court: I suppose a second-run theatre would be anxious to get the best pictures, wouldn't it, so as it would take some of the business away from a first-run theatre?

The Witness: In a situation where there was
115 competitive access, I think that would be the case.

The Court: Who books for the second neighborhood run theatres?

The Witness: Well, for those that were owned by the same or operated by the same people as the first run, the same people did. In other cases, others did.

The Court: Wouldn't it be true that the average operator of a second-run theatre, if he had a very good motion picture, that he thought might have good drawing power, would go out and try to get it irrsepective of whether it was shown on the Loew's or the RKO circuit because that might develop more business in his theatres?

The Witness: It might very well, and if he tried that and failed, however, with the power which Loew's and RKO exercised over this entire territory, he would then be cut out for good, and that was a risk which very few of them ever dared to run.

Mr. E. Raftery: I move to strike out the last part.

The Court: If you know that is so—

The Witness: I don't know it is so of my own
116 knowledge.

The Court: Then strike it out.

The Witness: I thought you asked me for my explanation.

The Court: That is your explanation, but, I mean, it is not based upon your personal knowledge.

The Witness: No.

The Court: All right.

What is the next question?

By Mr. McGovern:

Q. Mr. MacMillen, did you cause an analysis to be made of the product being exhibited over these two circuits? A. I did.

Q. What did you find out?

The Court: About what?

Mr. McGovern: About the product being exhibited in the theatres of the two circuits?

The Court: Obviously they were motion pictures but, I mean, what do you mean? What did he find out about the quality, quantity?

Mr. McGovern: With regard to the distributor.

A. Well, I found at that time that RKO was distributing all or substantially all of the pictures that were
117 being offered for distribution by Fox, Warner's and by RKO. I found that Loew's was distributing all or substantially all of the pictures which were being offered for distribution by Paramount, Columbia, United Artists and by Loew's themselves. And I found each of them were distributing about half of the Universal product.

Mr. E. Raftery: I think we can agree he meant "exhibited."

Mr. McGovern: "Exhibiting," yes.

The Witness: "Exhibited."

Mr. E. Raftery: We weren't distributing anything.

The Witness: I meant "exhibited." Excuse me.

Q. Have you an exhibit or chart prepared, Mr. MacMillen, to reflect that play on the circuits by distributor? A. Yes.

Mr. McGovern: I ask to have this marked for identification.

(Marked Plaintiffs' Exhibit 9 for identification.)

Q. I show you exhibit marked for identification
118 Plaintiffs' Exhibit 9, with the caption, "Division of Eight Major Distributors' Product Between Loew and the RKO Metropolitan Circuits '48, '9, as Shown by Film Rentals Paid by Circuits," with a parentheses "Data From Interrogatory Answers," and ask you if you would explain to the Court what that chart shows. A. This shows whose pictures each of the circuits were playing. It shows, for example, take the second bar, the Warner Bros. Theatres—Warner Distribution Company, shows that of the pictures that were being distributed by Warner's, on either the Loew's or RKO circuit, I mean, 1948, '9 that Warner distributed 100 per cent of their product on the RKO circuit and none on the Warner, and on the Loew circuit, for Fox, it shows the same thing, for RKO the same thing. The bar for Universal shows that Universal distributed roughly half of their product at that time on the Loew circuit and half on the RKO circuit. And the last four bars show that Loew's, Paramount, United Artists and Columbia distributed substantially all their products on the Loew circuit.

Q. Mr. MacMillen, you have described two charts—

Mr. E. Raftery: If your Honor please, it hasn't
119 been offered, but the source of certain film rental, that is nothing but grouping in a lot of rentals without in any way breaking them down or showing what they mean, and I don't believe it is in any way helpful to the situation.

The Court: Frankly, I don't know what those charts mean. I cannot see what it means.

Mr. E. Raftery: It is an attempt to create an illusion rather than the fact.

The Court: Let me ask you, Mr. McGovern, what does it mean? What does it prove?

Mr. McGovern: Take the first chart, your Honor, the first bar, blue bar there, which reflects that RKO got approximately 100 per cent.

The Court: Of what?

Mr. McGovern: Of its revenue from the two circuits, from the RKO circuit—

The Court: What does that mean, RKO displayed only RKO pictures?

Mr. McGovern: Pretty much. It obviously means that because nearly all of its revenue from the two circuits came from the RKO circuit. You take the middle bar—

120 The Court: You talk about the two circuits.

Mr. McGovern: That is right. That is what the word Source means—another part of the chart shows as the source, circuit, film rental paid, from the eight distributors, from what sources. The chart shows from what the eight distributors get their revenue.

The Court: RKO, you say, got 100 per cent of film rental from the RKO theatres?

Mr. McGovern: Right.

Mr. Gillespie: Excuse me, could I ask, is that in the metropolitan area?

Mr. McGovern: Yes, metropolitan area alone.

The Court: So you are saying RKO, in effect, displayed nothing but RKO pictures.

Mr. McGovern: No.

The Court: RKO theatres displayed but nothing but RKO pictures?

Mr. McGovern: No. What this shows is RKO pictures were displayed only in the RKO circuit.

Perhaps that middle bar there is a better example. Take the case of Universal. That shows, you see, that Universal got about one half of its revenue from the RKO circuit.

The Court: It isn't a complete picture of it? This shows, if anything, the caption of it, that RKO's

121 profit was divided between Loew's and RKO, as shown on this chart. In other words, RKO's product all went into the RKO theatres.

Mr. McGovern: Yes, sir.

The Court: Loew's products, 97 per cent went into Loew's theatres?

Mr. McGovern: Right.

The Court: Fox product went 100 per cent into RKO's, is it?

The Witness: That is right.

Mr. McGovern: That is right.

The Court: But it doesn't show that those theatres didn't display something besides those pictures.

Mr. McGovern: No, it doesn't, sir. The caption says it merely is a division of how the eight major distributors displayed their product between the two circuits in terms of film rental and the source from which they derived that film rental.

The Court: It isn't so important in this case that RKO showed only RKO pictures in RKO theatres, but if it showed other pictures also, that would be important.

Mr. McGovern: What this does mean, though, is this, in our judgment: You have two circuits, Loew and
122 RKO, and this chart quite clearly reflects what the Court found back in the Paramount case, that not only did you have the two circuits had, in a sense, monopolized exhibition, but the two circuits agreed between themselves to split the product of distributors.

The Court: All right. I don't see Eagle Lion on here.

Mr. McGovern: No, Eagle Lion is not anywhere on here. We have a chart which will show a further breakdown in detail with regard to each of the independents.

The Court: All right.

By Mr. McGovern:

Q. Mr. MacMillen, you have described two charts here, one that showed the ownership of the theatres in the metropolitan New York area by circuit and another which shows the distribution of circuit film rental between the distributors by circuit. Have you also had a chart prepared which is designed to show the relationship between the film rentals that the plaintiffs took out on the New York area in relationship to their national gross on the film rentals

which the majors took out of the New York area in
123 relationship to their national gross? A. The New York subsequent-run area, yes.

Q. In the New York subsequent-run area.

Mr. McGovern: I ask to have this marked for identification.

(Marked Plaintiffs' Exhibit 10 for identification.)

Q. I show you an exhibit marked Plaintiffs' Exhibit 10 for identification, Mr. MacMillen, which bears the caption, "Comparison of Eagle Lion Revenue With the Revenue of Major Distributors From Subsequent-Run Theatres in Metropolitan New York," and a sub-caption, "Ratio of Subsequent-Run Rental From Metropolitan New York to National Film Rental Less Such Subsequent-Run Rental," and ask you if you would describe what that chart purports to show.

124 Mr. E. Raftery: Now we are going to get into a very serious objection.

The Court: I realize. I am going to let him describe what the chart purports to show and then hear your objection.

A. This chart shows the share of the national film rentals that we took out of the New York subsequent run in comparison with the share of their national film rental which the other eight major distributors took out of the same territory.

By the Court:

Q. Let me ask you this: By "subsequent run," you mean everything except the first run in New York? A. Yes.

Q. It means the first neighborhood run and all others? A. Precisely. It shows that in relation to what we took in the rest of the country we took 6.4 per cent of our revenue out of this New York subsequent run area. It shows that the eight major distributors, in relation to what they took in the rest of the country, took 8.9 per

cent out of the subsequent run territory in metropolitan New York.

To state it differently, it shows that for every
125 million dollars we earned elsewhere in the United States, we earned $64,000 out of subsequent run in metropolitan New York. For every million dollars the eight major distributors earned elsewhere in the country, they earned $89,000 in this territory.

Q. Let me ask you this: You here compare all of your profits for 196 features? A. Right.

Q. But when you come to comparing the eight major distributors, I see you have there 96 features. A. Well, sir—

Q. Why do you compare all of your features with just 96 features of the other distributors? A. We were offered, as I understand it, in answer to the interrogatories here, these 96 features of the eight major distributors as being typical and a fair sample of their product. We used all of ours.

The Court: Where is that interrogatory and that answer? I don't see how you can compare 196 features, being your entire production, with 96 features of eight other so-called major distributors. It seems to me there is a question as to whether you have a right comparison
126 there. You prepared the chart or had it prepared. What is the basis upon which you can use those 96?

Mr. McGovern: For the record, I could ask the witness what is the data on which this chart is prepared.

The Court: All right.

The Witness: The data for the Eagle Lion product was prepared from our own records, and the data for the eight major distributors was prepared from the answer to the interrogatories to the original defendants in this case and which they represented as being a fair sample.

The Court: Where is that interrogatory and that answer? Without that we don't know what we are talking about.

Mr. E. Raftery: Of course, none of these defendants made any of the answers to those interrogatories. They are made by the eight defendants they let out.

Mr. McGovern: Let me go back a little bit, if I may, your Honor, and describe the situation we had here.

The Court: Sure.

127 Mr. McGovern: When we originally filed the complaint, we had in mind claiming damages for the entire period we were in this business, namely, from 1943 down to the date of the complaint, which is October 3, 1950. We followed the complaint up with an interrogatory that demanded from them their playing data on all of their product for the entire period of time all over the country. As you can understand in such matters, that interrogatory led to a series of discussions back and forth between us and I sincerely regret that there is not present in court today the gentleman with whom I negotiated those interrogatories and the resultant data because at that time neither Mr. Raftery nor Mr. Gillespie—I think I am right about this—represented the companies they are now representing; at least, in connection with this lawsuit.

The result of those negotiations were that Mr. Roy McDonald, acting as a sort of clearing house for all the major distributors, undertook to withdraw any objection he had to the interrogatories if we would agree to limit our demand for those interrogatories to what he called a fair sample, and he reserved the right to object, if

128 we ever asked for any more.

Now, what they tendered us—

The Court: A fair sample of what?

Mr. McGovern: A fair sample of the performance of their product over the period of time involved here.

He pointed out to us, for example, it would be sufficient for the purposes of the interrogatory if instead of insisting upon each film—each feature film—distributed by each of the major distributors for each year we took three feature films from each of them for each year, took the

median picture from the top quarter in terms of national grosses, took the median picture itself in terms of the whole range of national gross for a given season and took the median picture from the bottom quarter in terms of national gross.

The Court: Let me ask you this: Why is there any mystery about the whole amount? I suppose the revenues of the eight major distributors for the seasons of 1946 to 1950 for all their pictures nationwide are probably a public record.

Mr. McGovern: No, your Honor. To get this information at that time was a burden.

129 I told them we would assume the burden as to our own products, but I recognized the burden involved here, and if they were agreeable to giving us this as a sample which they felt was an adequate picture of their performance throughout the country of their product, that we would accept that, at least temporarily.

The Court: Did these defendants who are now here, Loew's and RKO, agree as to that?

Mr. McGovern: No, these two defendants did not, but the point—

The Court: How are they bound by what some other defendants who are no longer in the case may have stipulated?

Mr. McGovern: Let me point this out. At the pretrial conference, from which you have read Judge Ryan's order, we gave them a trial brief. That is back now, your Honor, over approximately three years ago, May 4th of 1953. We wrote Mr. Raftery at that time and pointed out to him that our statistician had put together the figures which are reflected on this chart and to that Mr. MacMillen has just testified.

We pointed out that they had themselves declined
130 to give us any more material in those original interrogatory negotiations and we ended that letter at that time with this suggestion. I point out that this is

nearly three years ago. I am reading from my letter dated May 4, 1953, to Mr. Raftery, which is attached to our trial brief submitted to the Court at that pretrial conference:

"You will recall that at the time the interrogatories were served, we asked for the New York metropolitan area rental data for all of the defendants' films released during a six-year period. In consideration of the defendants' claim that furnishing this data would be too burdensome, we agreed, at defendants' insistence, to accept a sample consisting of 96 film, 12 of which would be from each defendant and 3 of which were to be for each of the four seasons 1946-1947 through 1949-1950, uniformly selected by a formula intended to make the selected pictures representative of the performance of all of the defendants' features in this area during this period. We are satisfied that this 96-picture sample is adequate to correctly reflect
the ratio of the defendants New York metropolitan
131 subsequent run revenue to their remaining domestic
film rental for all of their features which were released during the period in question. If you propose to attack the validity of the agreed sample to establish this ratio, we should be promptly advised."

Now, we wrote a similar letter to Benjamin Melniker dated April 14, 1953, for Loew's, Inc., and perhaps I should say that in so far as Loew's is concerned, it is of course an integrated company, so that they were parties to the original agreement as to the data to be supplied by the distributors.

The last paragraph of our letter to Mr. Melniker reads, and I again point out this is dated almost three years ago:

"An analysis of the information furnished shows that during the season October 1, 1948 through October 1, 1949 the only product of the defendant distributors exhibited in the Loew's Metropolitan Circuit was the product of MGM, Paramount, United Artists, Columbia and one-half of

Universal. We agreed to cut down the data required, first from 1944 through the first nine months of 1950, and then from September 1, 1946 through Septem-
132 ber 1, 1950, and then finally to the one season in the case of Loew's on the ground that the data furnished would be representative and assume that the division of the defendant distributors' product between Loew's Circuit and the RKO Circuit which existed during that period is representative of the four seasons from September 1, 1946, to September 1, 1950. If the division of product for the period September 1, 1946 through September 1, 1950 was any different from that shown by your answer as to the 1948-49 season, it is requested that you furnish comparable data concerning any of the three other seasons in which the differences occurred."

I point out, your Honor, that the compilation of this data was a very, very considerable task for all concerned; that we worked out an arrangement that seemed to be practical in the sense that it relieved the defendants of a great deal of the burden—

The Court: All I want to know is whether these defendants admit that these 96 features are representative and are therefore a true basis of comparison with 196
133 features of Eagle Lion. I take it that they do not.

Mr. McGovern: I would suggest this, sir, that this is all the data they would give us at that time. We put them on notice that if it was not representative, to please give us the data. By waiting until now to raise that, they have prevented us from going to court at an earlier point and getting it brought forth in an orderly manner.

I suggest this, that if three years after the date we first transmitted the information to them they now want to raise any question about it, why, of course, there is no argument but that the fact is the fact. If they want to go ahead and get the rest of the material to prove that this sample is not adequate, I suppose they are entitled to do so.

The Court: This has been so far marked merely for identification and we won't have to pass upon the question of whether it will be admitted in evidence until after there is an opportunity for cross examination by the defense counsel:

By Mr. McGovern:

Q. Mr. MacMillen, directing your attention back to Plaintiffs' Exhibit for identification No. 10, if Eagle Lion had derived from the New York metropolitan area the
134 same proportion of its total national gross, less the metropolitan area, that the majors did, what would the result be as far as that—

The Court: Objection sustained. That involves this exhibit. It is very, very clear from the exhibit and I am not going to take that evidence until we find out whether this exhibit is proper. That is merely a conclusion that can be drawn from the exhibit.

Mr. McGovern: Yes.

Q. If, Mr. MacMillen, the Eagle Lion companies, the plaintiffs here, had gotten as much out of the New York area as the defendants did—as the distributors did, the major distributors did—in terms of their total national gross, how much additional rental would the plaintiffs have gotten?

Mr. E. Raftery: Objection.

The Court: Objection sustained.

Aren't you moving ahead a little fast in that? Let me ask Mr. MacMillen, who is a very fine business man, I know, when he found this situation existed back in these years, what did he do, did he try to get some pictures taken by Loew's and RKO? What did he do about it?
135 Isn't that the normal question that you would have in a situation like that?

By the Court:

Q. What did you do about that? Did you try to get some of your pictures on these circuits? A. Yes, sir.

The Court: Why not develop that. Then you are going over something we can deal with specifically and practically.

Mr. McGovern: I was coming to that, your Honor, but let me say—

The Court: I don't want to get a summary of what the damages might be in a case unless we have figured out what the basis of the damages is first. You were really starting out with how you compute your damages, and let us get the other part first, I think, and then we will find out whether it is a right computation of damages.

I think what I would like to hear—we are going to take a five-minute recess in a minute—is what actually happened with reference to Eagle Lion on specific pictures, because that is the test as to whether they couldn't get in.

There should be in specific cases what the reasons
136 were. Then you will have representative test cases.

I don't think you can say that because a company got only a certain percentage of the business in a particular area you therefore were damaged under the antitrust laws. You will have to show something more than that. That is why I suggest that you go into some of the practical things that were done about it.

No business man who is being excluded from a territory sits back and does nothing.

Let us have a five-minute recess and then we will go into that aspect of it.

(Short recess.)

By Mr. McGovern:

Q. Mr. MacMillen, when did you become the chief executive officer of the Eagle Lion Films Company, the distributing company? A. In the spring of 1949.

Q. When you became the chief executive officer of the distributing company, as Judge Dawson suggested before the recess, what did you do? A. Well, either at that time or shortly before in 1949 when I had found this situa-
137 tion which I described in the New York subsequent

runs, I went to William Heineman, who was then vice president in charge of sales, and I asked him to explain to me how this situation existed.

Q. And what did you find out as a result of that?

The Court: Objection sustained. What Mr. Heineman told him is not evidence. That would be hearsay.

Mr. McGovern: I asked him what did he find out.

The Court: From whom?

Mr. McGovern: From his examination.

The Court: He said he talked to somebody. That would be hearsay evidence.

Mr. McGovern: Yes.

The Court: He cannot say what he found out from somebody else.

Q. As a result of those conversations with Mr. Heineman, Mr. MacMillen, what, if anything, did you do then? A. At that particular time, immediately after that I did nothing further except to continue to watch how our pictures were being played in this territory.

138 Q. What did you next do about the siutation?

A. Well, the next thing, other than keeping an eye on it, as I indicated, was about a year later, when I went to call on the chief executives of the two theatre companies.

Q. Can you fix the time of those two calls in your recollection? A. I recall that they were shortly after the decree in the Paramount case was entered, which places it some time in the spring of 1950.

Q. In the spring of 1950 did you go to see the management of the RKO circuit?

The Court: Whom did you see, first?

The Witness: I saw Mr. Kingsberg, who was president of the company.

Q. Would you detail as much of your conversation with Mr. Kingsburg as you can recall? A. I told him that I had come to talk with him about the problem we were having in getting our pictures played on the RKO circuit. I told him that we were not getting competitive access and

that failure was having such a dire effect on our company that unless we got competitive access to the circuit we would have no alternative but to bring a suit for
139 damages under the antitrust laws.

I told him that at that time the industry was having its own problems and I didn't want to create any more problems for the industry, I wasn't there to threaten him, but that in my judgment our company could not survive without access to this market, and that I was there to tell him my intentions in advance of doing anything to see if we could get access to his circuit.

He said to me he knew we had not gotten everything we wanted on the circuit but he had no animus towards the company and, as a matter of fact, he was glad that Eagle Lion had come into existence because it gave him as a buyer of product another source and that presumably would lead to a higher quality of pictures that he could play on his circuit.

He asked me what I meant by "competitive access."

I told him I meant the right to play our product picture by picture, preferably theatre by theatre, and, in any case, in open competition with the other distributors.

He said, "Well, there I have a problem. I have other pictures I have to play. First I have to play the
140 RKO product. You don't expect me to play the Eagle Lion product until I have played that."

I said, "Yes, I do, that is exactly what I expect. I expect that the Eagle Lion product will have the same access to the RKO circuit as the RKO product."

I remember he said, "MacMillen, that is silly. We can't do that. But I will talk to my bookers and see what we can do about playing some of your product in the other time that is available."

I think he even said to me that he would screen some of our pictures himself.

Q. Did he, do you know, or do you know what happened after that? A. I don't know whether he did that or whether he did not.

Q. Now, to whom did you speak over at the Loew's circuit? A. I spoke to Mr. Moscowitz, who I believe was executive vice president.

Q. Would you give us the substance of your conversation with Mr. Moscowitz? A. Well, I told him at the outset I was there to talk about our failure to get competitive
141 access to the Loew's circuit. I told him it was having a dire effect on our company, and if we couldn't get access we would have no alternative but to bring a suit under the antitrust laws.

He said, "If you are here to threaten me we won't have any conversation."

And I remember I got up to leave and said, "You can characterize those comments any way you want and if you don't want to hear what I have to say I will go."

He said, "Sit down and let's hear what you do have to say."

I repeated in a little greater length our failure to get access to his circuit, and he said he doubted that we were being discriminated against in any way; in fact, he was sure we were not; and, in any event, what particular pictures was I complaining about.

I told him that I wasn't complaining about any picture, I was complaining about the practice that existed and continued to exist in New York, and I referred to the judgment that had just been entered in the antitrust suit and I told him he knew what I was talking about just as well as I did.

142 He said, well, he thought I was being misled by my sales department and that if I would come to a meeting with Mr. Picker, whom I think he described as the chief buyer for his company, or he is the man who made that decision, and bring Mr. Heineman, that we would listen to those two converse about the reasons why the pictures had not been played and he thought I would be convinced from such a meeting that we were not being discriminated against.

And we had such a meeting, and I recall at the end of it telling him that far from convincing me that we were not being discriminated against, it only reinforced my belief that we were being constantly discriminated against.

Q. Did this Mr. Heineman, to whom you have adverted, attend that meeting with you? A. He did.

Q. And Mr. Heineman was who? A. He was the vice president in charge of sales of Eagle Lion Films at that time.

Q. And do you know where Mr. Heineman is at the present time or what his occupation is? A. Yes. He
142a is now vice president in charge of sales of United Artists.

Q. After these conversations with the management of the two circuits, did you in fact get any greater access for Eagle Lion product on those circuits? A. Not for some time later, when we finally brought this lawsuit.

143 Q. What effect, if any, did that have?

Mr. E. Raftery: I object.

The Court: Bringing of the lawsuit?

Mr. McGovern: Yes.

The Court: For what period are your damages claimed, up to the bringing of the lawsuit or to when?

Mr. McGovern: We have a supplemental complaint, your Honor, which I think updates damages to April 28, 1951. Let me rephrase the question.

By Mr. McGovern:

Q. After the date of the complaint on October 3, 1950, did Eagle Lion get any additional product on the two circuits for exhibition? A. It did.

Mr. E. Raftery: There is no evidence that they ever tried to get any product.

The Court: I know there hasn't been any evidence so far. They tried before. I will take that answer that they did.

Where is the evidence aside from those two visits that

Mr. MacMillen made to these two executives that they had ever tried to get any of their pictures shown? What had they done? Does he know?

144 By Mr. McGovern:

Q. Mr. MacMillen, do you know what efforts were made by the Eagle Lion management to obtain exhibition of Eagle Lion films on these two circuits?

The Court: Do you know that of your own knowledge or does someone else know it?

A. I never tried to sell them a picture myself. As the chief executive of the company, I knew what was happening in the company and I knew such efforts were being made constantly.

By the Court:

Q. By whom? A. By the vice-president in charge of sales and his staff.

The Court: I think to establish that the picture did not get on you have got to have somebody who went around and said, "Here is a picture," a specific picture, and who he talked to, what he did about it. In other words, I do not believe that you can prove a conspiracy merely by proving damages. In other words, you can say, "We did not get all the business that we thought we ought to get and therefore the defendant is liable. There must be something wrong."

145 You have to show first why that situation existed and then establish what the damages were.

Mr. McGovern: If your Honor please, I think the showing we have made so far reflects the fact that you had a monopolized situation here in this first neighborhood run metropolitan market in New York. The impact of that kind of monopolized situation on a fellow outside of the monopoly I think is something that flows as night after day.

The only way we can measure the impact on us is to try to arrive at some sort of a yardstick which reflects

how that affected us financially in comparison with what we would be reasonably entitled to expect if it were not in operation.

The Court: Let me ask Mr. MacMillen.

By the Court:

Q. Were any Eagle Lion films shown in the Loew's and RKO circuits in the years 1946 to 1950? A. Yes.

Q. And a number of them or just— A. Yes.

The Court: There is the thing that seems to me raises the question. If it was a situation that no picture was shown, then you have a complete monopoly which
146 is barring Eagle Lion from the market.

Now, if a number of pictures were shown on the RKO and Loew's circuits and other pictures were not shown, does that prove monopoly or may it simply indicate that they did not get all the pictures shown that they thought they should have shown and that then becomes a question of degree? Why should they have had more pictures shown? That is something which requires some evidence, I think, because you cannot say there was a monopoly when there was not a monopoly that excluded that.

Mr. McGovern: I suggest, Judge Dawson, that the proof of the monopoly does not derive from what happened to our pictures. What happened to our pictures is proof of damages as a result of the monopoly. We have given you an independent showing here starting with the Paramount decree in 1945 to the effect that these two circuits monopolized first exhibition and, secondly, the major product that was available for distribution through those two circuits.

Now, it is perfectly true that owing to whatever reason motivated them from time to time they did not completely exclude us. That is the fact. However, when we
147 were admitted, we were necessarily admitted as anyone outside the door of monopolists knocking on the door for admittance. They admitted us on whatever terms they saw fit.

This just cannot be otherwise because of the situation that confronted us.

The Court: Suppose we assume that all those facts are true. Nevertheless, what effect would it have on you except that you did not get all of your products shown that you thought should be shown? Now, don't you have to establish that certain of your films should have been taken and were not taken? You haven't even shown yet what percentage of your films were taken, what percentage of the films shown in the RKO and Loew's circuits were Eagle Lion films.

Mr. McGovern: We will put in testimony as to that by our statistician, who has gone over the data from our own files and the interrogatory data.

But getting back to your earlier inquiry, let me suggest that the only way you can show what happened to you is to take a look at the financial results for yourself and for anything else that is comparable during the period.

148 Now, let me give you an example.

The Court: The question comes up what is comparable. That is the only point I am directing my attention to.

Now, we have got to decide what is comparable.

Mr. McGovern: Yes.

The Court: That is something which I do not think can be decided upon any basis of comparison of what Eagle Lion thinks should have been shown compared to what was shown, because that is a matter of subjective judgment.

Mr. McGovern: To some extent I think it is.

The Court: Therefore, when Mr. MacMillen says, "We were being excluded from the market," and it turns out he was not being completely excluded, the question as to the extent to which he was being excluded and the basis for the exclusion becomes a matter of proof.

Now, it seems to me we have to go into that and get some concession as to what type of exclusion there was

here and whether it was an illegal exclusion, as you contend, or whether it was an exclusion on the basis of the quality of the films, which is what the defendants contend.

149 Mr. McGovern: I suggest it reminds me of Learned Hand's remark. I am sure your Honor is familiar with it in the Alcoa case. He said it is silly to talk about monopoly price fixing. Any price he fixes is monopolistic and therefore illegal.

That I suggest is the situation that confronts you when you try to measure the impact of a monopoly on you. We were not free to go to him with a picture. I do not care whether it is a picture like Red Shoes, which I think it is a mighty fine picture, but we were not free to take a picture to these theatres and sell this picture theatre by theatre, picture by picture. This was foreclosed. We could not do it. We had to take our pictures over to Mr. Moscowitz and Mr. Kingsberg and try to sell the circuit.

The Court: Do you say that is what caused your damage?

Mr. McGovern: Yes, sir, no question about it. I say we were confronted with a monopolistic situation which prevented us at the outset from ever getting the real potential of our product.

150 The Court: Would you say the same situation exists today when there is a Loew's circuit today which probably buys all the pictures for the circuit, does it not?

Mr. McGovern: At the moment, your Honor, I am not clear as to what part of the divorcement decree has been—

The Court: The divorcement was the divorcement of the producers of pictures from the theatres. What you are contending here is that it is illegal and monopolistic for a group of theatres to be be combined in one chain and do their buying as one unit. Do you contend that is what caused the damage?

Mr. McGovern: I think our evidence will show they do

not buy that way today, but, secondly, you must have in mind when the divorcement was decreed as a result of the Paramount case, many theatres were forced to be sloughed off by the chains. Those two chains were not left in the condition they were at the time we are talking about. If they had been, the Government would have succeeded in achieving mighty little relief.

You have any number of chain circuit cases, such as the Crescent and Schine circuits. No, a man is
151 not free to chain up enough theatres in a given area so it gives him monopoly power when an independent comes to him and tries to sell product. That is certainly true.

The Court: That is one of your contentions?

Mr. McGovern: Yes.

The Court: It was the combining of these theatres in chains that caused some of your damage?

Mr. McGovern: That is right. They say, for example —you heard oral argument this morning—we had some art pictures. I say we did have some. We had some like Red Shoes. They told us, "Red Shoes, you don't expect us to play that in a circuit like this, do you?"

Subsequently they did play Red Shoes in a circuit like this and did very well.

But the point is, Judge Dawson, we were not free to go to some of these neighborhood houses that would have been glad to have that kind of picture because of the neighborhood.

The Court: When you say "neighborhood houses," are they separate corporations, are they owned by the chain?

Mr. McGovern: I expect probably for tax pur-
152 poses they are separate. I don't know. The defendants can answer that question.

Mr. E. Raftery: Let us set the Judge straight on Red Shoes.

The Court: It was a good picture. I saw it.

Mr. E. Raftery: It was a fine picture. But this Eagle

Lion, the big monopolist, played it for two years in the Bijou Theatre and would not let RKO or poor Loew's have the picture. That is the story on that.

After it had been milked dry at the Bijou, they were kind enough to let RKO play it over its entire circuit.

The Court: That is an argument but it is not testimony and therefore I won't take it into account because I am not going to take testimony from lawyers.

We will strike it out and disregard it.

Mr. E. Raftery: He said he could not get it in.

The Court: If you have a witness who can establish that, all right, but don't you testify to it.

153 Mr. McGovern: What I am suggesting, Judge Dawson, is this, that we have proven, I say, starting with the Paramount judgment itself for the year 1945 and carrying you down, by independent proof based upon their own interrogatories as to which they cannot object here, the continuation of that same situation from 1945 down through 1950.

Admittedly there was no relief here until after 1950 as a result of the divorcement decree in those cases. During that period of time Mr. MacMillen has testified that upon examination of the operations of his company as chief executive officer, he found that Eagle Lion was not taking from this New York area a percentage of its national gross which he at least in his judgment and experience thought was appropriate. And I take it his testimony goes to the proposition that having inquired what that difficulty was, he then pursued the next step, and that was to take up the matter with the management of the two circuits; but this, of course, I assume does not overlook the fact that the vice-president in charge, who unfortunately is not available to us as a witness—

The Court: Why not?

153a Mr. McGovern: He is working for United Artists at the present time.

The Court: He is still available?

Mr. McGovern: He is still available but obviously it is difficult to call him.

The Court: I do not know why. I presume if he came he would tell the truth wouldn't he?

154 Mr. McGovern: I presume he would.

The Court: Then he is available.

All right, you may go ahead with the next question, then.

By Mr. McGovern:

Q. Mr. MacMillen, would you describe your negotiations with independent producers and relate the difficulties you had obtaining product from independent producers?

Mr. E. Raftery: I object.

The Court: That is a little broad. Let us take it bit by bit. Let us not draw with such a broad brush.

Q. Mr. MacMillen, would you undertake to describe your negotiations with independent producers to procure product for distribution? A. We would attempt to convince the independent producers—

The Court: Who?

The Witness: I.

The Court: Who did you attempt—

The Witness: Independent producers.

The Court: Who, when? Let us get down to specific cases. A. Beginning in the summer of 1949 until

155 April of 1951 I was responsible for obtaining contracts from independent producers to distribute their product for sales commissions through our sales company.

Independent producers are people—are entrepreneurs who produce or finance a motion picture or small groups of motion pictures and contract to sell them to the theatres through one of the distribution companies in contrast with, let us say, the major companies who consistently, year after year, make large numbers of pictures and distribute them through their distributing affiliate or the distributing section of the same company.

Among the independent producers with whom I talked were Peter Rathvon, Sam Spiegel, Bernard Beaugeaus,

Frank Melford, Eddie Small, Walter Wanger, Stuart Sheftel, Harry Popkin, Bill Dozier, Charles Lederer, Jim Mulvey.

Some of these are representatives of producers rather than producers themselves. Those are some of the ones I recall at this time. Lester Cowan is another. I am sure that doesn't represent all of them, but those are the ones that come to mind.

By the Court:

156 Q. Take any situation there and describe what happened and with whom and where it happened. A. Well, I will start with Peter Rathvon. Peter Rathvon was the former president of RKO who at this point, which is in 1949, about the summer of 1949, had formed an independent production group who were scheduled to make a series of pictures.

I communicated with Mr. Rathvon and solicited his pictures for sale and distribution through Eagle Lion Films. In the course of that solicitation, I tried to persuade him of the advantages in having his pictures distributed through Eagle Lion.

We discussed the terms, the commission fee which we might obtain, he obviously trying to obtain a lower fee and we obviously a higher fee.

Those negotiations continued for a period of four or five months when we finally consummated a contract under which we agreed to distribute his pictures and he agreed to pay a fee for that distribution, and those pictures were distributed by Eagle Lion Films.

Do you wish me to tell you some other examples?

The Court: That shows you got a distribution. What bearing does that have on the case. I will leave

157 that to Mr. McGovern.

By Mr. McGovern:

Q. What fee did you undertake to distribute those Rathvon pictures for?

Mr. E. Raftery: What has that got to do with it?

The Court: I will let him answer that.

A. In that case, I think we got only 25 per cent.

Q. And do you know why you got only 25 per cent as a fee?

Mr. E. Raftery: That is objected to.

The Court: I will let the witness answer.

A. That was the best arrangement that I could make at the time after discussing all the various matters which bore upon our distribution as against our competitors.

By the Court:

Q. You said you tried to persuade him of the advantage of distributing through Eagle Lion. What were the advantages of distributing through Eagle Lion? A. We felt that we had a first-class sales organization, in the first place. We had by that time very few or any of our own pictures, so that we could devote our maximum effort to the distribution of the pictures of independents.

158 That was not true of our competitors with the exception of United Artists. Most of the other competitors had their own pictures to distribute as well as independents' and we argued there was a natural inclination to favor those.

He argued, among other things, in turn, that we could not get his pictures on these metropolitan circuits we are talking about here, and he argued that very strongly, and as former president of RKO, he was in a position to be—

Mr. Gillespie: Well—

The Court: I will let him state it. It is not binding on RKO because he was the former president.

By the Court:

Q. Was that ordinary business trading, you were giving the advantages of your company and he was telling you the disadvantages? A. I would say on the whole it was ordinary business trading, yes, sir, but—

Q. Let me ask you—this is what puzzles me a little bit—did you run into the same problem about the distribution in neighborhood theatres in Chicago? A. I would say that we had some problems all around the country,
159 but there was no place where the problem was as severe or as critical as in this market.

Q. Did you find that RKO, Loew's and the eight major people had similar arrangements in most of the big cities in America, including those you have described in New York? A. I wouldn't say in most of the big cities. There were cities where there were arrangements, but by and large when I got finished examining our product and our problem, the large problem and the biggest part of our problem is right here in New York, and we decided to concentrate—

Q. Maybe the biggest problem, but wasn't this a nation-wide conspiracy that was described in the Paramount case? You say that conspiracy only existed in New York? A. No, sir, I don't say that. I say that there were other places where we were harmed, but I am saying that as the chief executive of the company, when I examined the problem, we had a problem in New York which in my judgment was critical and we devoted our efforts to solving that problem.

Q. That is a business matter. What I am trying to find out is this: Did you have any difficulty in
160 getting a free competitive use of your product in the rest of the large cities of the nation? A. I can only answer that in general terms, that I know we did but I cannot tell you precisely in which cities. I think I knew at the time but I don't know today.

The Court: All right, continue.

By Mr. McGovern:

Q. Mr. MacMillen, what other efforts about this time you have described, the spring or later in 1950, did you make to obtain independent product other than from these

independent producers you have mentioned? A. Well, I negotiated an arrangement with Film Classics, which was another independent distributor, to effect a merger between Film Classics and Eagle Lion Films.

Q. What was the result of the merger with Film Classics in terms of your operations? A. The merger was never actually consummated, but Eagle Lion Classics, which was to be the resultant company, came into being and it succeeded to the distribution of the Eagle Lion pictures, and about that time or shortly thereafter Film Classics went out of business and we fell heir to a good part
161 of their product and that resulted in an increase in gross for our distribution company of some $25,000 a week on the average for the rest of that year and we made a profit—this is just 1950—for the balance of 1950 in our distribution activities.

Q. Did that merger with Film Classics result in any changes in the ratio of the revenue you were taking out of the New York area to your national gross? A. No, I don't believe it did.

Q. When was the Eagle Lion sale to United Artists arranged? A. It was arranged early in April in 1951.

Q. And why did you contemplate that sale at that time?

Mr. E. Raftery: I object to that. That is not in issue.

The Court: I will allow it.

Mr. E. Raftery: All right.

A. Well, I was afraid by then that we were never going to get this access to the circuits here in New York which I considered to be critical to our successful operation, certainly until our litigation was started.

In the early part of 1951, the pictures, the extra gross which we had obtained through the Film Classics'
162 pictures, began to die out and in the first three months of 1951 my recollection is we were about breaking even.

By the Court:

Q. Let me ask you about this Film Classics.

You say you got additional revenue. You got the pictures of Film Classics; is that right? A. Yes, sir.

Q. Was there any difference in the competitive situation or was it just a difference in the pictures? Did you have pictures which brought in better revenue in that area? A. It was primarily the fact that we had more pictures to distribute with the same overhead.

By Mr. McGovern:

Q. How much additional product did the Film Classics merger bring to the Eagle Lion Distributing Company, if you can recall? A. I don't think I recall the number of pictures, but I recall that the dollar volume average about $25,000 a week from June of 1950 until June or July—through the end of the year.

By the Court:

Q. Was that true in the New York Metropolitan
163 Area? A. This was our average increase in our national gross.

Q. How did that compare in the Metropolitan Area? A. We never could see any difference in the percentage. We were getting about the same percentage of that $25,000 out of the Metropolitan Area as we got out of the rest of our gross out of the Metropolitan Area.

By Mr. McGovern:

Q. The sale to United Artists took place on May 28th; is that right? A. May 28, 1951.

Q. What did you receive from United Artists as the purchase price on the sale of Classics?

Mr. E. Raftery: He has a written agreement, I hope.

The Court: I will allow him to answer. If he was in the office, he probably knows. What did you receive? A. We received a note for $500,000.

Q. Was that the only consideration passing, Mr. MacMillen? A. Substantially, yes. There was an agreement for them to process some films at our Pathe Laboratories, which was another subsidiary. It is not of importance.

Q. But in substance you sold the stock for $500,000? A. That's right.

Q. In your opinion, would the business you sold to United Artists have been worth any more had you had better access to the circuit in the period prior to the sale?

Mr. E. Raftery: I object.

The Court: Objection sustained.

Q. What did you sell to United Artists, Mr. MacMillen? A. Technically we sold the stock of Eagle Lion Classics, but before the sale we transferred to Chesapeake all of the assets, and Chesapeake assumed all of the liabilities other than the production—other than the distribution agreements and the exhibition agreements. So effectively we sold to United Artists our distribution and exhibition agreements.

Q. And what was done with the assets that were transferred away from Classics before the sale? A. Well, we disposed of them as best we could.

Q. What were those assets in particular? A. Cash, receivables, branch franchises and some fixed assets which consisted mostly of reels, cases, fixtures in our branches.

Q. What did you do, if you recall, with the franchises? A. Well, we had to write those off.

Q. And what did you obtain—

The Court: What sort of franchises?

Q. Will you describe the franchises involved in this transfer back, Mr. MacMillen? A. When the company was started, we made agreements around the country with certain local distributors to become a part, to sell their business to Eagle Lion Films. It was in this way gen-

erally that we created the nationwide distribution company through which Eagle Lion distributed its pictures. We paid a price of $1,600,000, approximately, for these franchises. They had been depreciated down to the time of sale to something like $720,000. When we sold our distribution contracts and our exhibition contracts, what remained had no value further and we were required to write off the $720,000.

166 Q. What disposition did you make of the fixed assets that you described as being in the exchanges? A. We sold those as best we could.

Q. Did you make a profit on the liquidation of those or a loss? A. We sustained a loss on those. They were depreciated down from some $300,000 at the time to about $150,000, and we sold them for some 69 or 70 thousand. So we had a $80,000 loss.

The Court: Do you mean taxwise or bookwise?

The Witness: Bookwise.

The Court: How about taxes? I mean, did you carry them at the same value for taxes that you carried them for the books?

The Witness: I believe we depreciated them at both ways, to my recollection.

The Court: Did you carry them at original cost on your books?

The Witness: Original cost on our books less depreciation.

Q. Are you able, Mr. MacMillen, to give us an estimate of the total losses suffered by the Eagle Lion com-
167 panies in both production and distribution during the period involved in this lawsuit, from 1946 to April 28, 1951?

The Court: Objection sustained. If there is evidence of losses. I think there ought to be some figures put in, which are subject to examination.

Mr. McGovern: Very well. We are going to call our public accountant.

The Court: Have something that can be put in that can be examined on.

Mr. McGovern: That is all I have, Judge Dawson.

Cross-Examination By Mr. E. Raftery:

Q. Mr. MacMillen, when you sold out to United Artists you sold them the film cans and a lot of other stuff, as a matter of fact? A. My recollection is that we didn't sell them the film cans, but we might have.

Q. You ended up in litigation with them over this deal, isn't that a fact? A. Yes, that is a fact.

Q. They had a long series of serious litigation which was only disposed of about a year or so ago, isn't that a fact? A. Well, I don't recall the date it was dis-
168 posed of. It seems to me it was two or three years ago. And I don't know, when you say "serious," I don't know what you, exactly what you mean by "serious."

Q. They gave you a note for a half a million dollars to buy this Eagle Lion Classics, isn't that a fact, the stock? A. Yes, sir.

Q. And they also agreed to take over all your distribution contracts, isn't that a fact? A. Well, I think, I described it as best I could, technically, by buying the stock, they acquired the obligations which were incident to the distribution contracts.

Q. If any of the pictures belonged to this Chesapeake or Pathe, they took over the distribution and accounted to you for any money that may have come in on those pictures, isn't that a fact? A. That is right.

Q. If they took any of the Rathbone pictures or any of these other independents, they accounted for those, isn't that a fact? A. I assume they did. After we sold them, of course, I am not familiar with exactly what hap-
169 pened, so I can't testify to that.

Q. At the time in 1946—by the way, in 1946, what, really, was your business, and by "your" I mean per-

sonally? A. Well, I had a series of assignments. My primary job, I would say, was president of the Federation for Railway Progress, that is to say, a trade organization in the railroad field.

Q. It published some work that told people how to run railroads, isn't that a fact? A. No, that is not quite accurate.

Q. What did it publish? A. It published a magazine. It was, I would say, a normal trade magazine that dealt with the industry generally and its problems.

Q. By the way, you are a member of the Bar, are you not, Mr. MacMillen? A. Yes, I am.

Q. And practice in Troy, New York, at one time? A. Yes, I did.

Q. And then after you got out of the Service in 1945 you joined the Robert Young Organization, isn't that a fact?

A. Well, I guess that is substantially accurate.

170 Q. Where am I inaccurate? I want to be accurate.

A. There is no such thing as the Robert Young Organization. So I am—you are substantially accurate.

Q. You joined something with the word "Chesapeake" in it? A. No, I didn't at that time. My primary operation at that time was president of the Federation for Railway Progress.

Q. That published what? A. Published a magazine. Among its other things it did was to publish a magazine entitled Railway Progress.

Q. And during 1946 and 1947 your primary job was in connection with this occupation as president of this Federated Company, whatever you call it, isn't it a fact? A. I testified that I was president of that during that period. Actually, the organization was formed, I believe, in February, 1947, and I spent sometime prior to that organizing it, and I became its first president and remained so until the summer of 1948 when I, as I testified, became an officer of these two companies.

Q. It was really in the summer of 1948 that you
171 joined what we used to know as Eagle Lions, isn't that a fact? A. That is a fact.

Q. Your connection in 1946 and 1947, up until 1948, you had no personal knowledge of the operations at the time except what you acquired after you joined the organization in 1948? A. I acquired some knowledge, as assistant secretary of the company, as I said. In that capacity I attended certain board meetings and took notes and I heard what went on at the board meetings. So I was conversant to that extent with what Chesapeake was doing in the motion picture business.

Q. Eagle Lion or Chesapeake, or whatever you want to call it, had a secretary as well as an assistant secretary? A. Yes.

Q. When the secretary was present he kept the minutes? A. No. I think, as a matter of fact, I did that. At the time I was assistant secretary I think I kept the minutes.

Q. So, as far as the operation of the company,
172 either in the acquisition of pictures or distribution of pictures, during this 1946-47, up to 1948 period, you had nothing to do with that, is that a fact? A. That is a fact.

Q. So you really came into the picture actively sometime in the summer of 1948, isn't that right? A. That is right.

Q. At that time Arthur Krim was the president, isn't that a fact? A. That is a fact.

Q. He is the fellow who is now president of the United Artists? A. That is a fact.

173 Q. Did Mr. Benjamin have some connection with it? A. Mr. Benjamin was, I believe, a director of both of these, Eagle Lion Company, and also a director of the parent company.

Q. And he is now chairman of the board of United Artists, isn't that a fact? A. I believe he is.

Q. Mr. Heineman, was he around when you went in? A. Yes.

Q. He was the vice-president in charge of sales, isn't that a fact? A. That is a fact.

Q. And Mr. Heineman determined the sales policy and the handling of the pictures for distribution not only in the metropolitan area but in the domestic field; isn't that a fact? A. That is a fact.

Q. And you personally had nothing to do with the sale or distribution of pictures to the exhibitors, meaning the theatres? A. That is correct; I didn't negotiate exhibition contracts.

Q. You had nothing to do with it prior to 1948
174 particularly; isn't that a fact? A. Yes, sir.

Q. When you first came into being, from your keeping these minutes, was there a man named Schwalberg as general sales manager of the first Eagle Lion? A. No, I think—yes, I know, from what source I don't now remember, but I know Mr. Schwalberg preceded Mr. Heineman in charge of sales.

Q. I think his name was— A. Albert—

Q. —on one of these contracts that I saw here this morning or this afternoon, I forget which, as having signed.

Mr. Schwalberg, at any rate, was head of sales before Mr. Heineman? A. That is correct.

Q. Mr. Schwalberg is available here, if you want him. A. I have no knowledge of Mr. Schwalberg.

Q. Don't you know he is engaged in business in the city of New York? A. I do not.

Q. Have you had any investigation made as to the whereabouts of Schwalberg? A. Have I?
175 Q. Yes. A. No, I haven't.

Q. Do you know whether counsel have in connection with this lawsuit? A. I don't know.

Q. Heineman, at least, is available, is he not? A. If you will tell me what you mean by available—

Q. He lives here in greater New York and works at 729 Seventh Avenue, isn't that a fact? A. I know he works

at United Artists and that United Artists has an office in New York. I don't know where he lives.

Q. The office is 729 Seventh Avenue, right? A. I don't know.

Q. You have never been there? A. No, I have never been there.

Q. Tonight will you look up the address of the United Artists? and I will ask you further about it in the morning.

Will you also ascertain if your former employer, Schwalberg, isn't in business here in the motion picture business in the city of New York right now?

The Court: He doesn't have to ascertain for you, but he can, if he wants. Either of you can subpoena
176 him.

Mr. Raftery: I am just asking for a favor.

The Court: All right.

Q. Do you know a man named Bernard Krantz? A. Yes.

Q. He was your general sales manager at sometime or assistant to Heineman? A. Both.

Q. Both? A. Yes.

Q. He is here in the City of New York, is he not? A. I don't know where Mr. Krantz is now.

Q. Did you read the Times this morning? A. New York Times?

Q. Yes. A. Yes, I did.

Q. You didn't read under "Motion Picture Notes" that he resigned yesterday as general sales manager of United Artists and has joined— A. I am afraid—

Q. —Cinerama, Stanley Warner? Did you see that? A. No, I'm afraid I don't read the motion picture paper any more.

Q. I am talking about the New York Times. A. I know that.

177 Q. Let us go back to the first part of your testimony. You were examined in the deposition by me, as a matter of fact, Mr. MacMillen? A. Yes.

Q. At that time do remember my asking you in regard to the quality of the pictures that were handled by Eagle Lion? Do you remember being interrogated at some length on that? A. Yes.

Q. Isn't it a fact you testified then that you personally are no judge of the quality of pictures? A. I don't recall whether I testified in those terms or not.

Q. Will you testify today that you personally are no judge of the quality of pictures? A. I think that is a fair statement. I know what I like and what I don't like, but perhaps, if you would tell me what you mean by "quality," I might be able—

Q. That is the same argument we got into three years ago. A. It is hard for me to answer the question if I don't know exactly what you mean.

Q. I mean quality as merchandise from distributors.

A. I think that by the time I concluded or after
178 I was there at Eagle Lion company a while I began to know quality in those terms.

The Court: I think that what Mr. MacMillen means is what I concluded years ago, that any resemblance between the quality of the picture, as an abstract term, and what money it makes are purely coincidental. Quality may be artistic quality. It may be money-making quality. I think you had better distinguish which one you are interrogating him about.

Mr. Raftery: Not artistic.

Q. Mr. MacMillen, in the early part of your testimony this morning you were telling us about PRC, and if my memory is right you said PRC was formed by Pathe Industries sometime in 1943.

Do you remember testifying to that? A. Yes, I do.

Q. As a matter of fact—By the way, did you ever know a man named Harry Frontus? A. I don't believe so. I don't recognize the name.

Q. Isn't it a fact he was the founder of PRC, as producers releasing, or whatever you want to call it? A. I don't know.

Q. Isn't it a fact that he was associated with a man named Harry Thomas in that company? A. I don't
179 know. I do know that Harry Thomas was associated with PRC Company. I recognize that name.

Q. Isn't it a fact originally Pathe Industries extended credit to this company, PRC, for raw stock and prints? A. I don't know.

Q. You don't know? A. No.

Q. You don't know the origin of PRC at all? A. Only except what I have testified to, that it was created in 1943.

Q. You don't know who owned it? A. From 1943 on I think Chesapeake owned it.

Q. Don't you know, as a matter of fact, that PRC had been in existence, either under the name or some other initials or some other name prior to 1943? A. I have no knowledge.

Q. But it is a fact that, if I understood you correctly, that company produced nothing but low budget pictures; isn't that a fact? A. I was created for that purpose, and I believe it produced only low-budget pictures but I wouldn't want to say that it never produced a higher budget picture because I never looked at a list or I
180 don't recall having looked at a list.

Q. These low budget pictures were divided into two categories, the westerns and action pictures, isn't that a fact? A. I haven't heard them characterized that way before but we did make westerns and we did make non-westerns.

Q. And when you say "low budget," have you any idea how low the budget really was on each picture? A. No, I don't think I have ever seen those figures.

Q. $15,000? A. I just have no way of telling. I have never seen the figures.

Q. As a matter of fact, they were in the very low budget pictures, were they not? A. I don't think I can add anything, of my own knowledge, to what I testified to.

Q. So you don't know, as a matter of fact, what type

and what budget pictures you took over from PRC when your company came into existence in September 1946? A. I have seen a list of the names.

Q. But you don't know what they cost? A. No, I don't now know what they cost.

181 Q. You don't know their quality? A. Well, again, if we take quality, artistically, I don't. I have my own opinion for what that is worth. If you are taking quality from the point of view of what they grossed, those figures I have seen. I don't have them in my mind today.

Q. But they were very low grossing pictures? A. Well, again, if you will tell me what you are talking about, I will give you—

Q. Then you have all those figures? A. Yes. I am merely trying to find out what you mean by low grossing.

Q. You have the figures? A. Yes, sir, I have.

The Court: He says, "What is a low?" Mr. MacMillen says "What is a low gross, is it 50 cents or fifty thousand, a million or what, low gross?"

Mr. Raftery: I haven't been sworn; I would rather get his answer.

The Court: But you are asking him that and he wants to know what you mean by a low gross. He says he cannot answer that unless you tell him what is in your mind.

The Court: If he has been president of a film
182 company for some time he should have some idea what a low gross is.

The Court: He may answer that and say what a low gross is.

Q. What do you think a low gross is? A. I would say under a hundred thousand dollars is a low gross.

Q. You are pretty sure there never was a PRC picture that ever grossed $100,000? A. Yes, I think there were some that grossed more than $100,000.

Q. The great majority? A. I would say the majority of them—I tell you, better than that, why don't I look this up tonight and I will be able to tell you in the morning just how many grossed under a hundred thousand?

Q. That will be much better. A. I don't have it in mind.

Q. Give me the low figure and top figure and the number of pictures, and I will be content with that.

Now, regarding the Rank pictures, the first Rank pictures, you weren't with the company when the first Rank pictures were delivered? A. I was not.

183 Q. And the man who could tell us all about those is Mr. Schwalberg, isn't that a fact? A. That is difficult for me to say. Mr. Schwalberg was the vice-president in charge of sales prior to Mr. Heineman, but I don't know whether the first Rank pictures were delivered during Mr. Schwalberg's tenure or during Heineman's tenure.

Q. Can you find it out also overnight by examining your records? A. I don't think I can do that.

184 Q. Was there a man named Youngstein with your company when you joined it in 1948? A. Yes, there was.

Q. What was his job? A. He was in charge of advertising, publicity and exploitation.

Q. Did he have a title? A. I don't think he did at that time but at some period he was the vice-president.

Q. Youngstein left you at some period or other; isn't that a fact? A. Yes.

Q. Before you did? A. I didn't hear you.

Q. Before you left? I mean before you sold out? A. Yes.

Q. Had Heineman left at that time? A. Heineman was no longer there.

Q. Who was running sales toward the end of it? A. Mr. Heineman left, I think, a month before—maybe six weeks before April of 1951. I think he left in February when his contract expired and Mr. Krantz, who had been Mr. Heineman's assistant and formerly had been head of

185 sales for Film Classics, was head of sales during that interim period.

Q. But Youngstein had left sometime before that? A. Yes, sir, I am quite sure he left before Heineman.

Q. Where is Youngstein today? A. I believe that Youngstein is also at United Artists. I am not certain as to that.

Q. So your former president, Krim, your former vice-president, Heineman, in charges of sales, your vice-president in charge of exploitation, Youngstein, are all with United Artists now and Benjamin from your board of directors is chairman of that board? A. I believe that is so.

Q. And all reside here in New York City? A. I don't know where they reside.

Q. All have places of business here in New York City? A. I believe they do, yes.

Q. And do you know whether any of those gentlemen have been subpoenaed to testify as to their efforts to license your pictures to either RKO or Loew's? A. No, I don't know.

Q. None of them have been here in court? A. None of them have been here in court today.

186 Mr. E. Raftery: Your Honor, I was going to a new subject that will take some time. I was wondering if we could suspend now until tomorrow morning.

The Court: We will suspend until 10.30 tomorrow morning.

Mr. McGovern: We do have some subpoenas out, and I wonder if they can be considered carried from day to day?

The Court: Surely. When you need them, see that they are here.

(Adjourned to February 9, 1956, at 10.30 a.m.)

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187 **William C. MacMillen**

resumed.

Cross-Examination continued by Mr. E. Raftery:

The Court: You may proceed, Mr. Raftery.

Q. Mr. MacMillen, I asked you if you would get me some budget figures on the Loew budget of PRC pictures. A. I was unable to get that, Mr. Raftery.

Q. You didn't get it? A. I was unable to get it.

Q. I think I also asked you about some grosses on the so-called Loew budget pictures. A. Yes, I was able to get some information on that. The records for the years prior to 1946 are in storage in a warehouse, but I have the records on the grosses for the PRC pictures for the year 46-47.

188 Q. That is what I want. A. I wasn't clear when I sat down to compute this whether you wanted the so-called non-western only or whether you wanted the entire program. So I have it both ways.

Q. By individual pictures. A. Want me to start at the top?

Q. Yes.

The Court: How many are there?

The Witness: Thirty, I guess.

Q. Let us get straight on this. These are the U.S. national gross? A. National gross.

Q. From theatres to Eagle Lion? A. These are the national—these are the domestic grosses, right: $342,000, $222,000—

The Court: Let me ask you this: Have you the names of the pictures down here?

The Witness: I don't have those, but I think we have those available.

The Court: I was just wondering whether, instead of reading that, you could introduce an exhibit in the record. Wouldn't it make it more understandable, instead of just a lot of figures?

189 Mr. E. Raftery: Instead of that, I have them here under figures furnished to us. I will withdraw this at this time.

The Court: It is all right, you may do it, but a lot of figures mean nothing in the record unless they are tied in with something.

Q. Judge Dawson asked you yesterday how many of the Eagle Lion Pictures played in the RKO-Loew theatres

during 1946 to 1950 and your answer was, if I remember correctly, "Some". A. I don't remember what my answer was.

Q. Now, Mr. Gross furnished us with certain records. Isn't it a fact that from your records—I am confining this to the RKO theatres only—of the 196 pictures released by you during that period, either under the PRC banner or the Eagle Lion banner, 111 of the 196 received some playoff in the RKO theatres in the metropolitan area; isn't that a fact? A. I don't know.

Q. You don't know? You won't say it is not a fact? A. No, of course not. If you have—we furnished you those figures, I assume the figures were accurate.

190 Q. You would not say it was not a fact? A. No, of course not. If we furnished you those figures, I assume the figures were accurate.

Q. Now, you are not claiming in this lawsuit any discrimination by RKO against any one of your particular pictures; isn't that a fact? A. Yes. The gist of our complaint is not against any particular pictures; against the practice which existed.

Q. And you so testified on your deposition, you are making no complaint against RKO or Loew's based upon discrimination against any individual picture released by you? A. That's correct.

Mr. E. Raftery: That is all.

Cross-Examination by Mr. Gillespie:

Q. Mr. MacMillen, as I understand it, you testified yesterday that you went directly into the motion picture business in the summer of 1948. A. I did.

Q. And then you remained in that business approximately two years to the summer of 1950; is that correct?

A. No; until April 28, 1951, when we disposed 191 of Eagle Lion Classics.

Q. Then it is a little bit more than two years that you were in the business? A. Those were the dates.

Q. Now I would like to ask you the same question that Mr. Raftery asked you a moment ago in respect to the number of Eagle Lion pictures that showed in the Loew circuit during this four-year period from 1946 to 1950.

Do you know how many of the Eagle Lion and PRC pictures played in the Loew circuit during that period?

The Court: In Greater New York?

Q. (Continuing) In Greater New York. A. Do you mean in the Loew circuit or in a Loew's theatre?

Q. In any one of the theatres of the Loew circuit? A. I don't know that.

Q. Now asking you the same question that Mr. Raftery asked you on the figures furnished us by Mr. Gross, don't you know that it is the fact that a total of 111 Eagle Lion and PRC pictures played one or more of the Loew houses during that period? A. No, I don't know that as a
192 fact, but I assume that the date we furnished you were accurate.

Mr. McGovern: May I have that figure again, Mr. Gillespie?

Mr. Gillespie: 111. That is the combination of Eagle Lion and PRC, Mr. McGovern; 21 of PRC and 90 of Eagle Lion.

Mr. McGovern: Is that the same figure Mr. Raftery spoke about?

Mr. Gillespie: Yes.

Mr. McGovern: You are speaking about both circuits?

Mr. Gillespie: Yes.

Mr. E. Raftery: You may have some duplication. Some of the pictures may have played in both the Loew's and RKO circuits. There were 220-odd, a little more than 196.

By Mr. Gillespie:

Q. Mr. MacMillen, as I also understood from your answers to Mr. Raftery, you are making no claim on any specific picture? A. We are not.

Q. It is the ratios you brought forward in this exhibit

that was marked for identification yesterday—I think
193 it was marked Plaintiffs' Exhibit 10 for identification—upon which you base your claim? A. Oh, no, sir. That is merely the measure of damages. The claim is that a conspiracy existed here.

Q. I know, but so far as claiming the impact on you is concerned, it is based on these figures of these respective ratios of your pictures versus those of the eight major distributors? A. No, that also is not true.

Q. Now, let me ask you with respect to Plaintiffs' Exhibit 10 for identification. I notice here that you referred to the fact that this is "Ratio of subsequent-run rental for metropolitan New York to national film rental, less such subsequent-run rental."

I would like to ask you whether in respect of the eight major distributors there is included in there rentals received by the eight major distributors from theatres other than Loew's and RKO? A. I understand that that was what we asked for and that is what you furnished.

Q. Correct. Now, in the metropolitan area as defined in this case there are some 600 theatres, are there
194 not? A. I thought there were a few more than that at this time, but I don't know of my own knowledge exactly how many theatres there were.

Q. But somewheres around 600? A. I thought that there were a little over 700, but I may be mistaken.

Q. I will accept your figure, a little over 700.

And the Loew's and RKO circuits, respectively, totaled somewheres around 100? A. A little less, I believe.

Q. So that there are included in here rentals from approximately 500 to 600 additional theatres? A. Yes, that is correct.

Mr. Gillespie: That is all.

Mr. McGovern: No redirect, your Honor.

(Witness excused.)

195 **Norman Gross**

called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Wright:

Q. Would you state your full name and address, please. A. Norman Gross, 1784 East 28th Street, Brooklyn, New York.

Q. And what is your occupation? A. I am an assistant to the treasurer of Chesapeake Industries.

Q. How long have you been employed by Chesapeake? A. I have been employed since October of 1951.

Q. And you were prior to that, were you, connected with the film exchange? A. Yes, I was.

Q. What was that connection? A. I worked for Columbia Pictures Corporation at the home office for six years in New York, and the last year, the seventh year, I was the office manager of the New York Exchange.

Q. Now, can you just tell the Judge briefly the kind of records that are kept at the exhange there
196 with reference to the performance of films that the distributor delivers, the film rental records.

Mr. E. Raftery: At what exchange?

Q. At the New York exchange which serves the territory. A. My experience—

Mr. E. Raftery: What has Columbia got to do with this?

The Court: If he will rephrase that to find if there are standard types of figures kept for film exchanges generally, I will allow that question.

By Mr. Wright:

Q. Mr. Gross, the New York exchanges, I take it, for all distributors serve this metropolitan area, do they? A. As far as I know, yes.

Q. In your experience in the business, is there any particular difference in the general method of handling records of performance of films in the area? A. I assume that

the methods of keeping the records in the exchanges were pretty much the same.

Q. Will you just tell us—

Mr. E. Raftery: If your Honor please, we move to strike the answer because it is based on an
197 assumption.

The Court: What he assumes, of course, is not evidence. Ask him what he does know about the method of keeping records.

By Mr. Wright:

Q. Will you just tell us what, if anything, you have done in connection with this case that has to do with records of film rentals received in the New York area, first with respect to Eagle Lion films. A. Well, with respect to Eagle Lion films, the data was collected from the Eagle Lion exchange records, the rentals paid by each of the theatres on each of the pictures that comprised the Metropolitan Area as described between counsel. Those figures were put on a paper and added up picture by picture.

Q. I gather you were the man who examined the records and you examined the original data and whatever records there were. A. No. That was supervised by Mr. Melamed, the treasurer, and he turned those records over to me intact.

Q. But after Melamed had collected them—you are talking about the treasurer of Eagle Lion; is that
198 correct? A. That's correct.

Q. You examined them and tabulated them? A. That's correct.

Q. I just want to get a picture, if I can, for the Court of these records that you tabulated, what they were. A. The records that were tabulated under my supervision were simply sheets, several hundred of them, that contained information that was taken off at the exchange from what is called a cut-off card. That is, each theatre for each season in the New York exchange area has at

least one cut-off card and contains the titles of all the pictures in that particular program, and when the rentals are determined, contracted for, that information goes on the cut-off card and what they simply do is to take the cut-off card and transpose the information on there with respect to these pictures, and those theatres that were inside the boundaries of this area.

Q. I take it from what you have said the basic exchange record as to the performance of a distributor's film in a particular theatre is a cut-off card which shows the rental that theatre paid? A. That is correct.

199 Q. For a particular run? It also indicates the run, does it? A. The cut-off card indicated the run, the booker's cut-off card.

Q. And I suppose also the terms of the contract under which the picture was exhibited. A. Ordinarily it carried the title of the picture, the available date of the picture to that particular theatre, the contract terms, if it was a percentage contract the admissions at the theatre and the film rental as per the contract terms.

Q. In addition, in the exchange were there any records kept other than those showing the rental paid by the particular theatre? A. There were other records. For example, these records that I referred to earlier here were in the booker's department. The cashier's department kept them in another form for the purposes of billing and collection. The salesmen may or may not have kept their own cards which reflected the same information and the information which passed back to the home office, and in some cases they actually kept a duplicate set there.

200 Q. In the exchange, isn't it also a fact that you would have a record picture by picture of the rental received by the picture in the exchange area in addition to this theatre-by-theatre record? A. There was no formal record kept in the exchange, as I recall it, where you totaled up the total revenue of a picture. That was readily available from the home office where they had the tabulat-

ing equipment that combined these figures on the machine.

Q. That was a home office record which would show then, I take it, what a particular picture took out of each—what were there, thirty or thirty-one exchange areas? A. that's correct. The source of the records for the home office were these thirty-one branches, and when that material is funneled into New York, we at Columbia had an IBM arrangement, and they were quickly tabulated by branch, by picture, and that information was available.

Q. Then is it also true that in your home office—

The Court: You are talking about Columbia or—

201 Mr. Wright: We are also talking about Eagle Lion.

Q. Is there any difference in the Eagle Lion practice in that respect? A. As explained to me by Mr. Melamed, who was in charge of the Eagle Lion setup, that, as far as I could determine, closely paralleled the kind of bookkeeping arrangements we had at Columbia.

The Court: Did Eagle Lion have a record from which it could show how much was returned on each one of the pictures?

The Witness: Yes, they had a tabulation of the national and the New York exchange, and they had cut-off cards at the exchange which carried the same information.

The Court: Do you know that?

The Witness: I have seen the cards and I have seen the tabulations.

Q. That is, the home office would keep, in the ordinary course of business, a record of the national and the exchange performance on each picture, is that correct? A. That information was kept on a weekly basis and as quickly as possible that information was put

202 together.

Q. As I understand it, that information was readily available. When it came to determining, however, what the performance of any particular picture of Eagle Lion was in this New York Metropolitan Area, was there any

regularly-kept records that you could just take off the books of the exchange or did you have to construct that by adding up the individual figures for the theatres in the area? A. For the purposes of the ordinary operation, the IBM equipment, which makes the task relatively simple, is kept by exchange area. With regard to New York, that would cover the Northern New Jersey, the Five Boroughs, and the lower part of Westchester, and Long Island. They didn't keep, and neither did Columbia, that I know of, nor Eagle Lion, keep records that would indicate the one total figure for the area that is defined in this suit. So, in order to determine what film rental was taken from an area less than the whole exchange, you had to go back into the actual theatre-by-theatre record to be sure that you got the right theatre, and the picture-by-picture, and then add it all up again, because you

203 were taking less than what was ordinarily tabulated.

Q. As I understand it, then, for this Metropolitan Area as defined in the suit, you would have to construct in each case a figure representing the total, and that would not be readily available either in the home office or the exchange? A. No, sir.

Q. That is what you did with reference to these 196 Eagle Lion pictures we have been talking about? A. That is what we did on the 196.

The Court: Were those only pictures distributed by Eagle Lion during the period involved in this suit, 196?

The Witness: There were 196 pictures released in this period. There were some pictures that were still in release, which had been released in the earlier years, that were still playing some place in the United States.

The Court: All we are concerned with are the 196 pictures which were released in this period, is that correct?

The Witness: Yes.

204 Mr. Wright: Yes, as far as the amount of to damage claim is concerned.

I will ask to have marked for identification, as the

plaintiffs' next exhibit number, a schedule here which contains on it the totals of these 196 pictures and certain data.

(Marked Plaintiffs' Exhibit 11 for identification.)

Q. This schedule that has been marked as Plaintiffs' Exhibit 11, that, as I understand it, contains on it the 196 pictures that are the subject of the percentage figure that appears on that chart that was identified yesterday; is that right? A. That's correct.

Q. Those pictures were released during what period of time? A. These are the programs released by Eagle Lion for the program years '46-47; '47-48; '48-49; '49-50.

Q. Maybe you had better explain what you mean by a program year. A. In the trade it is a practice to start your—or had been at that time the practice to release your new program in the fall and it ran to the first of the year, into the spring of the following year,
205 so that we customarily referred to the program as the, for example, '46-'7 program, which would be that that started in 1946 and ran into '47, and the '47-'8 would be the tail end of '47 and '48. It was an arbitrary way of arranging your program.

Q. Were there any pictures that you distributed that were excluded from this 196 or is this all covered by that period that Eagle Lion had it? A. As I said earlier, these were the pictures that were released and distributed in that period. There were some pictures that had been released on earlier programs that were still in distribution, whatever rental they earned. They were pictures that were taken over from Film Classics in June 1950, and had been substantially distributed, which were not included.

Q. What I was calling your attention to: I understand there were some Selznick pictures. A. I will get to that. There were some Selznick pictures that were distributed by Eagle Lion and, again, on most of those we didn't have the entire distribution. On most of them we didn't

actually sell the picture but simply serviced the contract.

By that I mean shipped the prints, sent the bills,
206 but we didn't sell it, although there were four Selznick pictures in here which Eagle Lion had on a re-issue basis at that time, and they are included.

Q. The Selznick pictures you have in here are those that Eagle Lion itself did the selling, is that right? A. That's correct.

Q. Those are the re-issues. Then, as I understand it, Selznick had a selling organization of his own, did he not? A. He did at one time.

Q. And the pictures that their organization handled the selling on and you handled the mechanics of distribution, those were omitted from this schedule; is that correct? A. That's correct.

Q. How many of those pictures are there? A. Which ones, Mr. Wright?

Q. The Selznick pictures which Selznick sold and you handled the mechanical distribution of, that you omitted here. A. On pictures like—

Mr. E. Raftery: To please the Court, we are deal-
207 ing with the 196. With these Selznicks we are just cluttering the record.

The Court: What difference does the Selznick pictures make?

Mr. Wright: They—

Mr. E. Raftery: They don't make any difference.

Mr. Wright: Well, I have been trying to make clear exactly what we have here, that there were some pictures that weren't on and which had mechanically been handled by Eagle Lion but were omitted.

The Court: I understand.

Mr. Wright: And Selznick had sold—

The Court: These re-issues of pictures which had been issued by Eagle Lion or by its predecessor earlier, is that right, before this period?

The Witness: I am not clear about that. I know with

regard to the Selznick pictures that he had had the original releases and Eagle Lion had the—

The Court: On this document which has been marked for identification, certain titles have next to them the word "re-issue" and I just wanted to make sure whether those are or are not the Selznick pictures. That is all I am interested in.

208 The Witness: There are many re-issues on the schedule, and four of them are Selznick.

The Court: All right.

Q. I think his Honor was interested in what that re-issue means generally. I take it those pictures you have tagged with the label "re-issue" were pictures which had had a prior release here in the exchange and a prior play-off either in the hands of your company or someone else. A. That's correct.

Q. I suppose there might have been some Film Classics pictures in there too that had been originally— A. I don't see—there are no Film Classics.

Q. —released by someone else.

The Court: Just tell us what "re-issue" means.

Mr. Wright: Yes.

The Witness: Well—

The Court: On this chart, if you made this chart.

The Witness: Yes.

The Court: What does it mean on there?

The Witness: A picture, when it is first produced, is sold as an original run and it is sold

209 throughout the country and throughout the world. Then, at the discretion of the distributor, sometime later he finds that he can again exhibit the picture, certainly in the United States, and this is called a re-issue simply because it has been through that area at some prior time, maybe many, many years before.

The Court: All right, I understand.

Mr. Wright: Yes.

Mr. E. Raftery: I don't quite understand.

Might I ask the witness one question to clear my mind?

The Court: Let us not interrupt.

Mr. E. Raftery: I just wanted to find out what "re-issue" means.

The Court: All right, go ahead.

Q. Just tell us, if you will, Mr. Gross, what you got on each of the column headings there. That word "National," the first column, that refers to what? A. "National" refers to the film rental earned by the picture in the United States.

Q. That is the total of the gross from all the theatres that played the picture? A. From all the theatres that played the picture domestically.

210 Q. Then that next column headed "New York Exhange," that is what? A. That is the total film rental earned by the picture in the area commonly served by the New York exchange.

Q. Then the next column, which is headed "New York First-Run"? A. That is the revenue received by the distributor for the exhibition of the picture at the first-run theatre in New York.

211 Q. I notice you have gaps there indicating that some of those pictures didn't receive a first run. Do you know what that means, as to what happened to them? A. That means, on this chart, that that particular picture had no first run in the midtown Manhattan area of any kind.

Q. And went right into the neighborhood theatres, is that it? A. That is right, if it went in at all.

Q. Then the next column is NY-Metro. What does that mean? A. That is the figure we had to construct by hand, as it were, by going to the individual cut-off cards that covered the theatres that were contained in the metropolitan area as defined. So this would be the total revenue received by the distributor on each picture for that particular area, New York metropolitan area, described for the purposes of the suit.

Q. By the way, when was it you prepared this schedule? A. Schedule in this form was prepared directly after my examination before trial, 1953—is that
212 correct?

Q. Then you had previously constructed those figures, though, that are listed as New York metropolitan? I am just trying to find out when that job was done and about how long it took. A. As I say, that particular job, New York metropolitan, was supervised by Mr. Melamed, treasurer of Eagle Lion, as I understand it, and the job was commenced in the spring of 1951.

Q. And concluded when, in 1953? A. By October of 1951, when I went to the employ of Chesapeake, those figures had already been taken from the record and he gave me the worksheets to tabulate.

Q. Then you made that tabulation and you say this schedule was prepared after you were examined by Mr. Raftery on deposition in the spring of 1953, is that right? A. The schedule in this form, yes. I had all the material.

Q You had all the data. Then, as I understand it, this was prepared, was it, at his request from your data? A. That is correct.

213 Q. And just continue, if you will, and cover what you put in the other columns for him. A. The New York first-run theatres is the next column. That is the name of the theatre that played the picture first exhibition in New York in the midtown Manhattan area.

Q. That is the theatre that paid the rental shown in the third column? A. Precisely, that is correct.

Q. Then I see you have got the next heading which is Chicago exchange. What are those figures? A. Those are the rentals received by the distributor, in this case Eagle Lion, on the exhibition of its theatres in the area served by the Chicago exchange.

Q. Then the last column, City of Chicago, that means what? What do you have in there? A. Those are the rentals that were earned by these pictures in—you see,

the Chicago exchange covers an area larger than the City of New York, much as New York covers an area larger than the City of New York, and that is the City of Chicago.

214 Q. As I understand you, in computing the percentage—by the way you made the computations that are reflected in the chart that was offered here as Plaintiffs' Exhibit 10, I believe. A. That is correct.

Q. That 6.4 per cent figure, I take it, the only thing that was used in computing that percentage of figures on this schedule that appear in the first column under "National" and in the fourth column under "New York Metropolitan," is that correct? A. That is not entirely correct. We had to eliminate the column "New York First-Run" from "New York Metropolitan." New York Metropolitan includes first run.

Q. I see. A. And we made that deduction.

Q. The figure you used—so that you did use the New York first-run figures there to get this figure you called metropolitan New York less — A. You may construct this figure from three columns in the chart, the national, the New York metropolitan and the New York first-run. That is enough information to make the chart.

Q. This ratio, then, that you have there of 6.4 percent, that represents the proportion of the

215 New York metropolitan less New York first-run bears to the national figure? A. Bears to the rest of the country. In other words—

Q. Yes. A. (Continuing) —bears to the national with this New York metropolitan—

Q. Yes. A. (Continuing) —subsequent-run out of it.

Q. The rest is national? A. Yes.

Q. You didn't put the metropolitan and the first-run figure in both places?

The Court: You would have to, wouldn't you?

The Witness: No. This is a ratio as distinguished from a percentage. This is a ratio of what we did in the New

York metropolitan subsequent-run area compared to what we did in the rest of the country, including Northern New Jersey. That would be part of the exchange. But this is a ratio, it is not a percentage. Is that clear?

The Court: Let me ask you this: In the first place, in taking your national figures, you included first-run as well as—

216 The Witness: National is the whole picture.

The Court: So this is the percentage of your revenue which was obtained by the Eagle Lion in the metropolitan New York area less the first run as compared to the total revenue from the entire country?

The Witness: Less that thing that I am comparing, the New York metropolitan less the first run.

Q. And this figure you are talking about, metropolitan less first-run, is what you have referred to in that chart there as metropolitan subsequent-run, is that it? A. For the purposes of this chart, New York subsequent-run is the complete metropolitan rental taking the first-run engagement out of it.

Q. Yes.

The Court: And you compare that with the national revenue, including first run?

The Witness: I have just taken the first run out of the metropolitan and thrown it back in the rest of the country, and what I have left is everything in New York metropolitan without the first run being included, and I have compared that as the ratio to everything else in the national.

217 The Court: I see.

Q. At the time your deposition was taken, I take it, you also supplied Mr. Raftery with worksheets showing the calculations you had made on this percentage figure, how it was arrived at? A. Well, no, there is no—there is no long division example on it. I had a summary sheet which indicates the ratio, and labels the ratio, and if you

went back and divided the pictures, you would come up with the ratio.

Q. At that time it was explained by you how you figured this ratio, was it not? A. I am not clear how detailed we got into that. I think he was simply interested in the figures.

Q. Did you give— A. I don't recall having made these computations with him then, but if I did, I did.

Q. You did give him a figure? A. I gave him all the figures.

Q. You gave him the percentage figure at that time, I think, that—what was it, 6.3? A. At that time it was 6.5.

Q. 6.5. Then you corrected that figure, did
218 you? A. Yes.

Q. By letter? A. In March, 1955, I sent Mr. Raftery a letter indicating that one of the pictures on that chart that was given him was—

Q. Let's just have the letter.

We will have that marked.

The Court: I don't think we need supplemental proof. He is now testifying that this is accurate. Leave that to cross-examination.

Q. What I wanted to be sure of, Mr. Gross, is that any corrections that were made appear on the face of this schedule we have marked. If there are any corrections which affect a figure on here, then I suppose we ought to have that. A. As I say, there is one figure, of one picture, that was corrected.

Q. Which is the picture? A. As I recall, it was the picture T Men, and it appears in one line, and is one figure, and that line is changed, and I have a new set here re-
flecting the change. If you were to substitute these
219 for those at my deposition, you would have the 6.4 instead of 6.5.

Q. That is what I want to get, is what page of this Exhibit 11 for identification does T Mean appear on. A. Are the pages numbered? I think number 4.

Mr. Gillespie: They are on the second page.

Mr. Wright: I see that is the eighth picture down and then—

The Court: Are you offering now this exhibit? Is this the corrected exhibit, this Exhibit 11?

Mr. Wright: I want to be sure that the correction appears on it before I offer it. That is all I am doing. I am going to offer it as soon as I establish that.

The Court: You may go over and ask the witness off the record if it is. I mean, you are offering the exhibit, and you have got to be certain that it is correct before you offer it.

Mr. Wright: That is precisely what I am doing.

The Court: Why spend a lot of stenographic time taking all that down? Go over and ask the witness.

220 Q. Will you just tell me, Mr. Gross, what the correction is on T Man, if any, that should be made on this exhibit we have here.

The Court: Which exhibit—exhibit 11?

Mr. Wright: 11 for identification.

The Court: Does that exhibit that you have marked for identification need a correction.

Mr. Wright: I think it does in this one respect, and that is why I am doing this.

The Court: Then take it back and correct it. Let us not put in things that you are going to correct with oral testimony of a witness on the stand. Take it back and correct it. Let the witness go down to the counsel table.

(To witness): You are excused. Go to your counsel and get it correct. I am not going to spend a lot of time having oral corrections of written documents.

(Witness and Mr. Wright confer at counsel table.)

(Short recess.)

The Court: Now do we know where we stand?

Mr. Wright: Yes, your Honor.

By Mr. Wright:

Q. Mr. Gross, will you now put the T Man
221 correction on the face of Plaintiffs' Exhibit 11 for identification. A. There is one figure changed, the T Man figure.

Q. And the total? A. The total. It changes the total of all the figures in that one column.

Q. And the balance of the figures you have on that exhibit are correct? A. Yes.

Mr. Wright: I offer the exhibit.

The Court: Do you want cross-examination about that exhibit first?

Mr. Wright: It is a matter of your convenience.

The Court: I will allow cross-examination on the exhibit to see whether it is relevant or not, and then I will decide whether or not to take it.

Mr. E. Raftery: I have no objection to the exhibit except the last two columns. My friend may object, but I am not.

As to the last two columns for the City of Chicago, I am not going to object to them either even though Mr. Wright intimated this was prepared at my request.
222 The Court: You are not objecting?

Mr. E. Raftery: No.

The Court: Mr. Gillespie, are you objecting?

Mr. Gillespie: May I ask one or two questions of the witness?

The Court: Surely.

Preliminary Cross-Examination

By Mr. Gillespie:

Q. Mr. Gross, in the fourth column over on Plaintiffs' Exhibit 11 for identification, "New York Metro," I notice certain figures. The first one is $18,500 from Kit Carson. A. That is right.

Q. That is from the total New York metropolitan area as defined, is it not? A. That is correct.

Q. Now, there is no first run as far as that particular picture is concerned? A. That is right.

Q. That figure of $18,500 includes, as I understand it, rentals received by Eagle Lion from all theatres in the New York metropolitan area; is that correct? A. That's correct.

223 Q. Not only Loew's or RKO? A. No, sir, all theatres in the metropolitan area.

Q. All theatres? A. That is correct.

Q. And you heard Mr. MacMillen testify a few minutes ago that there might be somewheres between five and six hundred theatres in addition to the Loew's and RKO theatres in this area? A. Yes, I heard him.

Q. So that there is included in that figure revenues from one or more of those additional theatres? A. Certainly there is.

Mr. Gillespie: Your Honor, I object to this exhibit on the ground that it is in no way binding on Loew's, because it includes revenues at to theatres which we have no connection with whatsoever.

The Court: I will overrule that objection. I will take it for what it is worth.

By the Court:

Q. There is one question, however, that puzzles me about this. That is the difference between the New York exchange and New York metropolitan area.

Was the New York exchange of Eagle Lion co-
224 existent in territory with the New York exchange of Loew's? A. That is correct.

Q. And co-existent with the same exchange of RKO? A. That is correct.

Q. Now, that area included not merely Greater New York but what area did it include? A. It included Northern New Jersey, the five boroughs of New York, the whole of Long Island out to Montauk, and the southern portion of Westchester or up into New York State, and for the

purposes of this suit and by definition the metropolitan area itself as defined is less than the whole exchange.

Q. What is the metropolitan area of New York as defined in this suit, as you understand it? A. It is the five boroughs of New York City, Southern Westchester south of a line through Tarrytown and the western end of Long Island west of the line through Hicksville.

The Court: Maybe you cannot answer this, but I will ask your counsel to answer it.

Why do we define that arbitrary area as the New York metropolitan area? What is the genesis of that geographical distinction?

Mr. Wright: The genesis I suppose is the com-
225 plaint itself. The complaint defines the area in which we allege we have sustained this injury in those terms.

The Court: I just wanted to make certain where that is in the complaint.

Mr. McGovern: I think on page 10, your Honor, the top full paragraph.

The Court: I see. That is in paragraph 30 of the complaint.

Now I would like to ask Mr. Wright this question: What is the relationship between the New York metropolitan area as included in your complaint or as defined in your complaint with the area referred to in the findings of fact in the Paramount case, which is described in finding 154(d) as New York City? What was the Court considering was the area in the Paramount anti-trust agreement? Were they considering merely the five boroughs or what were they considering?

Mr. Wright: I think, your Honor, they were considering primarily the five boroughs. I do not think you can say the finding clearly defined the area they did have in mind, but from the evidence which was before them which showed the run situation in the four boroughs, I think it is fair to assume that that finding was primarily based

226 on the situation they found to exist in New York City.

The Court: In New York City. Leaving out the western part of Long Island and leaving out the southern part of Westchester County?

Mr. Wright: I do not know about Westchester. As I understand, the basis for working out this area was to roughly include the area over which these New York theatres took clearance. In other words, the area where the playing positions of the run were controlled by the New York playoff. That did extend, as I understand it, somewhat beyond the boundaries of the City itself. For example, I believe the houses in White Plains and the adjacent cities in southern Westchester County do what is known as playoff New York or follow New York and the metropolitan definition, as I understand it, was an attempt by both sides to define the area which really represented the metropolitan playoff, where the programs were controlled by the order in which the pictures were exhibited in New York City.

The Court: Of course, what it means is that this finding of fact in the Paramount decree is not necessarily coextensive with the area which you are now describ-
227 ing in this complaint.

Mr. Wright: I think the difference—

The Court: You may have to produce some proof to show why you defined it differently than in the Paramount decree in order to prove the relevance of the Paramount decree to this suit.

Mr. Wright: I say it was not defined in the Paramount decree. It was defined here, from the plaintiffs' standpoint, to tie it in as close as possible to the area being talked about there.

The Court: I understand now. You may go ahead. I will receive the document in evidence. It will be marked in evidence.

(Plaintiffs' Exhibit 11 for identification received in evidence.)

By Mr. Wright:

Q. There is one more thing on that exhibit I meant to ask you about. The first column has some check marks in it. Turn back to the one just received in evidence. That is this schedule of 196 pictures.

Mr. Gross, you have in the first column something that looks like "Median Picts."

What does that say? A. It says "Median Pic-
228 tures," although "Pictures" is abbreviated.

Q. Then you have checkmarks next to certain pictures, and tell us, if you will, just what that means. What was the basis for checking those pictures? A. I can only give you that in the context of the whole. The other information that I had to work with from other records other than Eagle Lion where we had information on pictures in the metropolitan area alone as distinguished from the New York exchange, the other major distributors had supplied information for three pictures a year for each of four years and each of the eight major distributors supplied that information, and in an attempt to show what that would do to our own pictures if we were limited, although we actually did it for every one of our pictures, if I made the same selection as they made, these would be the pictures I would have to select to make a sample of the Eagle Lion pictures.

Q. In other words, if you just took the checked pictures you would have the same kind of a sample of the Eagle Lion product that you got from the interrogatory answers that the defendants supplied; is that right? A. Yes, sir.

The Court: I do not understand what the basis
228a for picking these median pictures was. You say it would be the same. What was the basis on which they were picked?

229 The Witness: Should I answer that?

The Court: Yes.

The Witness: As I tried to indicate earlier, the amount of work required to pick out just this metropolitan area from the exchange—the exchange figures are comparatively easy to get. They are tabulated every week. If you only want a portion of that and there are several hundred theatres involved, you must go back to the original records in the branch.

As I understand it from my counsel, although we did actually do that for every one of our pictures, the eight major distributors indicated it was a tremendous job, and we well realized it, and they determined on a way to select pictures that would be representative.

The Court: What was that way is what I do not understand.

The Witness: You take one season's pictures and you line them up, the top picture being the one that has the highest national gross, the second highest, second, and you run them down for that season. You divide them into quarters and then take the median pictures.

230 "Median" means the one exactly in the middle. If there were nine, it would be the fifth one. They took the median picture from the top quarter—that was one picture for the year—they took the median picture from the bottom quarter—that was the second—and they also took the median picture of the hole group. In other words, if there were fifty pictures for the year, they took the twenty-fifth. This was an effort to supply limited information which would purport to be representative of the whole season.

The Court: All right, I understand now. I understand the basis for a median picture.

Mr. Wright: There is an exchange of correspondence between counsel.

The Court: I understand. Go ahead.

By Mr. Wright:

Q. Then, as I understand it, Mr. Gross, you did put these checks on here so that the defendants, if they wished could— A. Mr. Raftery, I think, actually asked me—

The Court: The checks have been described. What the defendants wanted to do is irrelevant, What is the next question to bring out a fact?

231 Q. Can you tell us, Mr. Gross, just what you did—first, do you have copies there of the data that you got from—in the form of interrogatory answers with respect to the performance of the eight other distributors that you referred to before this morning?

The Court: The interrogatory answers haven't been put in evidence yet. Let us find out what they are.

Mr. Wright: These are answers which were served upon us in response to the modified interrogatories which form this—

The Court: If it is going to be part of the record of this case, then you had better put the interrogatories and the answers in evidence before you ask this witness any questions about it.

Mr. Wright: The first thing I was going to do was have him produce them so they could be marked for identification.

The Court: I take it counsel has them. Is that right?

Mr. Wright: We can use theirs if they prefer. I simply wanted to use the ones he had himself worked with.

The Court: He cannot testify about anything un-

232 less it is in evidence. If there are interrogatories and answers to them, where are they? Let us have them. Then he can testify as to any conclusions he drew from them. Where are they?

The Witness: There is a copy here of the interrogatories and the answers that I worked from (producing documents).

Mr. Wright: Let us have those pulled so we can mark them.

The Court: Off the record.

(Discussion off the record.)

Mr. Wright: I might say, your Honor, we did not originally contemplate that the offer of this underlying

data was going to be necessary at all since we had made available the calculations made from it to counsel three years ago and had told them the precise use we were going to make of it at that time and had supposed that if there were going to be any corrections to the computations or figures, there was plenty of opportunity to do that long before we got to trial.

The Court: I understand that. All I am saying is that you cannot ask this witness for a calculation based upon admissions of the other side unless you make part
233 of the record what those admissions were and the answers to the interrogatories.

If you have them there, either original or copy, show them to counsel for the defendants, and if they have no objection we can mark them and then the witness can continue.

Mr. Wright: I would suggest that we have a recess for that purpose.

The Court: All right, we will take a five-minute recess for that. See if you can agree on that. I should not think there would be any dispute, but I want the record to be complete.

(A short recess.)

(Discussion off the record in the robing room.)

(Recess until 2:00 o'clock p.m.)

234 AFTERNOON SESSION—2 P.M.

NORMAN GROSS resumed.

Direct Examination Continued

By Mr. Wright:

Mr. Wright: I will ask to have marked for identification with the next plaintiffs' number, which I believe is 12, the interrogatories submitted by the plaintiffs upon the defendants in this case in October—or the date there, I

believe, is December—1950, together with an exchange of correspondence, modifying the interrogatories, which is attached thereto. That consists of a letter dated February 21, 1951, from Mr. Grieger to Mr. Roy McDonald, and a letter from Mr. McDonald to Mr. Krier, dated February 28, 1951, and a reply to that letter from Mr. Krieger to Mr. McDonald, dated March 2, 1951, copies of which were sent to all of the counsel for each of the then defendants in the case.

I offer this.

The Court: Let us mark it for identification. You are offering it in evidence?

Mr. Wright: Yes.

The Court: Are you offering the answers to the interrogatories too?

235 Mr. Wright: The answers will come afterwards.

The Court: Have them marked at the same time so we can consider the whole thing.

Mr. Wright: I wanted to read from this, while I am offering it now, to make the answers intelligible. I will have the answers marked, though.

The Court: Have the answers marked also.

Mr. Wright: All I am offering at this time are the answers with respect to the distribution question, those listed under I in the interrogatories I have just identified as those are the only ones involved in the computations we are talking about.

The Court: Have them marked for identification. Then you may draw such attention to it as you want, when received in evidence.

Mr. Wright: The answers of Loew will be marked for identification as Exhibit 13 then.

(Marked Plaintiffs' Exhibits 12 for identification and 13 for identification.)

Mr. Wright: And the RKO answers—

Mr. Gillespie: Mr. Wright, I cannot hear you.

Mr. Wright: I am sorry. We will mark RKO
236 Radio Pictures answers as Exhibit 14 for identification.

(Marked Plaintiffs' Exhibit 14 for identification.)

Mr. Gillespie: Off the record, what is Exhibit 13?

(Discussion off the record.)

Mr. Wright: Some of these answers are in different parts. If I can indicate for you what is in each one, maybe it would be helpful.

The Court: Mark the whole thing. All the answers of Loew's constitute one document.

Mr. Wright: Yes. I thought it might be well to indicate what was in them.

The Court: Let us have them identified, then when you offer them we can rule on it.

Mr. Wright: And we will have the United Artists answers then marked with the next number, which is 15.

(Marked Plaintiffs' Exhibit 15 for identification.)

237 Mr. Wright: The Paramount answer will be 16.

(Marked Plaintiffs' Exhibit 16 for identification.)

Mr. Wright: The Warner answer will be 17.

(Marked Plaintiffs' Exhibit 17 for identification.)

Mr. Wright: The Universal answer will be 18.

(Marked Plaintiffs' Exhibit 18 for identification.)

Mr. Wright: And the Fox answer will be 19.

(Marked Plaintiffs' Exhibit 19 for identification.)

Mr. Wright: And the Columbia answer will be marked as No. 20.

(Marked Plaintiffs' Exhibit 20 for identification.)

Mr. Wright: The parts I wanted to—

The Court: Are you offering some of these in evidence?

Mr. Wright: Yes, I am offering the interrogatories and the answers in evidence.

The Court: Are there any objections?

Mr. E. Raftery: Yes, I am not going to object on the ground of competency. I am objecting on the ground
238 of irrelevancy and on the further ground that what these are being offered for, as I understand it, is as a basis for a comparison between 96 pictures and 196 pictures, and we submit that they are not probative of anything, and furthermore, that it is a most unfair method of attempting to show damage, and further, on the ground that the answers made by these eight non-defendants are not binding on either of the parties here.

The Court: Therefore, you are objecting to them on the ground of competency?

Mr. E. Raftery: I am not questioning the accuracy in any respect. I say if the companies were down here with live witnesses we would object to the introduction of this type of evidence coming from the stand with the same force as we are objecting to it here. I am not questioning the accuracy in any respect. I am merely saying it is an unfair method of comparison and is not probative of any of the claims made by the plaintiffs in this situation.

Mr. Gillespie: I join in that same objection, your Honor, for the same reasons.

The Court: You do not object to the answers
239 given by Loew's and RKO to these interrogatories, do you?

Mr. E. Raftery: I object on the same ground. First of all, the RKO company that gave these answers has been dismissed out of this lawsuit.

The Court: So this is not the answer of the defendant in this lawsuit?

Mr. E. Raftery: That is right.

The Court: How about Loew's?

Mr. Gillespie: Your Honor, there is no question that

as far as the Loew's answers are concerned we were an integrated company at the time and that single company is still before the Court.

I do object, of course, to the answers of RKO on the same ground that Mr. Raftery does, and in respect of our own answers, while I respect the fact that they are admissions undoubtedly on behalf of Loew's, I believe that Mr. Raftery's objection applies just as much to this form of evidence for the purpose of comparison to Loew's as it does in respect of any other answers.

The Court: What bothers me about your objection is this, that you are saying that it is not probative of anything. Well, that is something which will have to be considered from all of the evidence in the case. If you
240 are saying that it is not probative of proof, that is not an objection to the admission of evidence. No little bit of evidence by itself may be probative, but taken together with other things it may be probative.

Now, if that is the basis of your objection, why, it seems to me that that does not have very much to it.

Now, am I wrong that that is the only basis upon which you are objecting?

Mr. Gillespie: I believe you are mistaken, your Honor. Our objection goes really, I think, to the fundamental hearsay aspect of this on the question of these figures being used for comparison purposes.

The Court: You say they are not admissions of these defendants, that they are no different from the hearsay statement of somebody who is not now a party to this action and not before the Court; is that the basis of your objection?

Mr. Gillespie: That is correct.

The Court: Is that the basis of your objection?

Mr. E. Raftery: That is partially the basis. A further basis is this, that they are completely irrelevant at
241 this time.

The Court: I could not keep these out as irrele-

vant. I would have to consider this together with all the other evidence to see whether it is irrelevant.

Mr. E. Raftery: May I be heard for one second on that phase of it? When you analyze these answers, the tests have not been met that would make them admissible at this time.

The Court: That is something that can be argued, but evidence in and of itself may be relevant although not conclusive on a matter. If the only test here is whether it is relevant, then needless to say the Court will take the evidence and see what relevance it has. Maybe you are right, maybe you are wrong, but a thing may be relevant and still be so distant from the real proof that it is not very persuasive.

If it is merely relevancy, that is one thing. If it is competency, that is another matter.

Mr. E. Raftery: On the hearsay aspect of it, this is the point that I wish to make. There are 96 pictures on one list and 196 on the other. No competent evidence
242 has been introduced at this point that the pictures in the 96 bracket are in any way comparable to the 196.

The Court: That is something you certainly could argue and something you could bring in proof on, but does that mean we do not have to take take the evidence of the 96 and the 196, or whatever it is? Maybe it is relevant, maybe it is not.

Mr. E. Raftery: I perhaps could bring proof, but I say the burden is on the plaintiff to establish comparability of pictures before he can put figures in, and he has not done that.

Now, that is the point of my objection.

The Court: Do you also object on the ground of hearsay and of competency?

Mr. E. Raftery: Yes.

The Court: I must confess that I cannot see how answers to interrogatories of people who are not now de-

fendants in the case are competent evidence as against the defendants who are in the case. So far as they are concerned, they are admissions of people who are no longer in the case. If you want to get that proof, you will have to get it as you would in every other case, by the proof of parties themselves.

Now, answers by the defendants themselves are
243 admitted under a different theory, and that is that they have answered certain questions and that they are bound by those and are admissions.

Now, an admission, by a third party is not necessarily proof as against these parties. Therefore, I will sustain the objection except in so far as the interrogatories and answers of Loew's are concerned. Those I will admit in evidence.

Mr. Wright: If the Court please, I apparently got a different impression from your Honor as to his basis of objection. I understood him to say that he did not object to the competency of these answers here as correctly reflecting what they purport to reflect as to figures or data which is in the files of these distributors.

The Court: He said if they were called as witnesses here they would testify that those were accurate figures, but there is another point. If you call a witness here who testified to that effect, that witness then is subject to cross-examination.

Now, merely taking an isolated admission of somebody not before the Court as probative without submitting him to cross-examination it seems to me is something which a court cannot do.

244 Mr. Wright: I would say, your Honor, that that is certainly true in so far as the cross-examination is intended to be a test of the accuracy of the figures, but we are happy to bring these people here for cross-examination if he wants to cross-examine them. That, it seems to me, is what we will have to do, but I do not understand that he expects by cross-examination to bring to the at-

tention of the Court any fact that is not readily apparent from the data that is in the interrogatories themselves.

The Court: Mr. Raftery says that the motion pictures which here involved are not comparable. Now, that is something which I suppose could be developed on cross-examination if the witness were here. It would be a strange extension of our federal procedure if an admission by a party not before the Court was received in evidence as against the people who are before the Court.

Mr. Wright: I do not understand, your Honor, that these are being offered or received as admissions at all. I take it that the basis on which these now rest is an agreement that if called to give testimony here, the various representatives of these companies who prepared
245 and swore to the answers would say that these schedules correctly reflected what was in their files.

The Court: But if the attorneys for the defendants are willing to have them admitted on the basis that they would present what the representatives of the other parties would testify to, that is another matter. I take it they are not ready to make such a stipulation.

Mr. Wright: I thought they were.

The Court: They say they are not ready to make such a stipulation. Under those circumstances, I cannot admit these interrogatories and the answers of parties not before the Court in evidence, and I will admit into evidence the answers to the interrogatories made by the defendant which is before the Court, which is Loew's, which I understand is the only one of those which was offered which comprehends answers by a party defendant in this case.

Mr. Wright: We then, I think, have no alternative but to put these people on the stand. I am just suggesting it does seem to me if what Mr. Raftery wants to do, and if I understand him correctly, is this, to show by cross-
246 examination that these pictures that the defendants had are different in their character and grossing capacity than those of the plaintiffs'.

All of that data is available to him. He can demonstrate that very readily—just as readily from this witness as from them. If he prefers to have it from them, he is entitled to it, I suppose.

The Court: All I have to do is rule on the documents when they are offered, and I have ruled. What you do in connection with that, of course, is up to you. You have an exception to my ruling.

Mr. Wright: Mr. Gross' figures of course involve more than just the Loew's pictures, and we have that problem.

By Mr. Wright:

Q. Do you have the Loew's data broken down there? A. Yes, I do.

The Clerk: Plaintiffs' Exhibit 13 for identification received.

Mr. Wright: And I gather the interrogatories themselves, 12 and 13 I take it are received in evidence. The others, as I understand it, are rejected upon the ground—

The Court: They are rejected.

Mr. Wright: Well—

The Court: You have an exception.

Mr. Wright: —I just want to be sure we know what we have to do.

247 The Court: You heard the ruling.

Mr. E. Raftery: And, of course, my objection is against Loew's being admitted against RKO just as much as the others.

The Court: I will receive it in evidence.

(Marked Plaintiffs' Exhibits 12 and 13 in evidence.)

Q. With respect to the data that you got as to the Loew pictures in these interrogatory answers that have been admitted in evidence as Exhibit 13, did you make any study of those figures to determine what the comparable ratio of the—

Mr. Gillespie: Mr. Wright, I am sorry, I cannot hear you.

The Court: Wait, don't interrupt. Let him finish the question.

Mr. Gillespie: I just cannot hear him.

The Court: Read the question as far as it has been propounded.

(Question read.)

Q. (continuing) —to compare the performance of Loew pictures in the Metropolitan New York Area with that of the Eagle Lion product?

The Court: With what product?

248 Mr. Wright: Eagle Lion, the plaintiff.

The Court: Did you?

The Witness: Yes, I did.

Q. Just tell us what you did in that connection. A. I did the same thing that I did to the Eagle Lion pictures to arrive at the 6.4, that is, the ratio of the New York metropolitan minus first-run, to the rest of the country. Of course the bar chart represents eight distributors, but if you were to take Loew's alone, the ratio would come out to 9.0.

The Court: What does 9.0 mean? It is 9.0 of what?

The Witness: It is actually the ratio of the Loew pictures in this group—there are twelve of them—the ratio of their New York metropolitan without the first-run, everything after the first-run is metropolitan area—the ratio of that figure to the national grosses on those figures but eliminating that figure. In other words, I have all the rest of the country on one side and I have Loew metropolitan without the first-run on the other side, and it is nine percent.

The Court: Where then do you put the first-run in Greater New York?

249 The Witness: That is back in with the national figure. In other words, I have eliminated one from the national, as I have termed it, the New York subsequent-run metropolitan, and them compare it to the rest

of the country. And the rest of the country, since I have left out the little hole in the middle, the first-run in New York City, I put that back into the rest of the country.

The Court: Let me see if I get this ratio.

The revenue that Loew's received from the New York metropolitan area less the first-run in that area is nine percent—is as 9 against 91 or the revenues of the entire rest of the country including the first-run New York, is that right?

Am I right on my mathematical statement of that ratio?

The Witness: You did pretty well. Let's see. The ratio of the metropolitan to the rest of the country—and that ratio—just at the end, I think, you missed. This figure less metropolitan first-run is actually 9 percent of that other figure, where the other figure is now 100 percent. I think if I may use figures for you—

The Court: That is where I am a little twisted, on the difference between a ratio and a percentage.

What is 100 percent in this figure? What is the 100 percent?

The Witness: Ordinarly, if you have a group of figures and you take one out, you will have the total with the one thing out, and it happens to be 10 percent, it is 10 percent of the total. In his instance I have a group of figures that total a certain amount and I have another group that total another amount. The second group is not part of the first. So I am saying ratio—you can describe ratio in terms of percentage as well—I am saying that the ratio of the New York sub-run is 9 percent of the rest of the country. For the rest of the country is 100 percent. There is a reason for doing that, and when we come to working out what it means in terms of dollars, it is a little less complicated to work that way, although it would be exactly the same and I could demonstrate it with simpler figures, if you used the other method, instead of just 9 percent that national included.

The Court: I am always a little bit suspicious of people

using mathematical formulas unless I understand them, and I am not a very good mathematician.

251 The Witness: I think I can show it to you.

The Court: It has to be done in words of one syliable.

Let me ask you this. If you took the the revenue from the entire country, of Loew's, as 100 percent, then what percentage would be the New York metropolitan area, excluding the first-run?

The Witness: I think you hit it right on the nose. That is the way to approach it, yes.

The Court: That is the way to approach it.

The Witness: Actually, the percentage to national, this is, and everything is national, 8.3 percent.

The Court: 8.3 percent.

Let me ask you this and get that figure in my mind. Of the entire revenue from Loew's nation-wide, including everything, 8.3 percent came from the New York metropolitan area less the first-run?

The Witness: That is not exactly so. Let me go on.

If I were to do the same thing for Eagle Lion, it would be 6.1 percent instead of 6.4. You may question—you do it the other way, the computation that follows is not

252 easy to follow and yet the answer will be identical because the figures are the same.

The Court: Now I understand.

Q. As between Loew and Eagle Lion, as I understand it, your comparison would be between 6.4 and 9.0 in the one case and 6.1 and—what was the low figure in the other? A. Using the Judge's method?

Q. Yes. A. Did I say 8.3? I have it in the record.

The Court: 8.3.

The Witness: 8.3, I think, your Honor, I said.

Q. Have you got the actual Eagle Lion figures that were involved there? A. Yes, I do.

Q. What were those? A. To arrive at this comparison—this ratio?

Q. Yes, the 196 pictures. A. The 196 pictures, for Eagle Lion, in the New York metropolitan area less the first-run, totaled $2,362,200; and the total national less this piece is $36,745,600; and the 6.4 is merely a ratio of that first figure to this second figure

Q. The first figure was the metropolitan subse-
253 quent-run? A. That's right.

Q. Let us have the comparable figures for Loew. A. For the Loew twelve pictures, the New York metropolitan less the first-run was $1,685,100, and for those same twelve pictures nationally, less that subsequent-run, was $18,630,500; and the ratio, 9.0.

Q. Do you know how the twelve pictures were selected that were used there in making the Loew computation? A. Yes, from the correspondence that counsel showed me, the pictures were selected, attempting to select a representative sample. This was true for all the companies including Loew.

Mr. Gillespie: Your Honor, I understand this is in correspondence.

The Court: Yes. Where is the interrogatory?

Mr. Wright: It is in evidence.

The Court: And the correspondence that show that, if it is in evidence?

Mr. Wright: That is Exhibit 12, I believe.

The Court: Let me see where it shows that those
254 twelve were representing samples.

Mr. Wright: That is what I started to do in the first place. I was going to read from that.

The Court: Let me see that part of those exhibits which are in evidence which show that those twelve are to be taken as representative of the entire set of pictures.

Mr. Wright: The interrogatories would show that.

The Court: You point out to me where the question was asked or the letter modifying it states that these twelve are to be considered as representative of the entire business of Loew's during that period. That is what I want to get.

Mr. Wright: Yes.

The Court: What does it show about that?

Mr. Wright: I have to refer to all the documents to tell you, sir.

The Court: Read into the record what it is that you say reaches that result.

Mr. Wright: Interrogatory 1 reads as follows:

255 List the feature pictures which were distributed by you for the motion picture season 1944-45, '45-46, '46-47, '47-48, '48-49, and '49-50 respectively, and with respect to each such feature picture, give the following information.

I will not read all that but just the data that we are talking about here.

1(d) is: Total gross rentals from exhibitions within the United States.

1(f) is: Total gross rentals and total net rentals from exhibition in the New York metropolitan area.

That area is defined in the complaint and in the beginning of the interrogatories.

The Court: Yes.

Mr. Wright: Then the exchange of letters which modifies that and substituted for the requested data as to all features, the data for the sample features, is this first letter from Mr. Krieger to Mr. McDonald dated—

The Court: McDonald then representing Loew's?

Mr. Wright: No. Mr. McDonald, I believe, was then representing RKO.

The Court: Who represented Loew's?

256 Mr. Wright: There were, apparently, discussions among counsel. Counsel's correspondence is with Mr. McDonald.

Loew's was then being represented, I believe, by the same counsel as now, a Mr. Ben Melniker, the house attorney, who was, I believe, handling the interrogatory negotiations below.

This letter of Mr. Krieger to Mr. McDonald of February 21 refers to the fact that they have had meetings.

In that case the Loew's representatives were—

Mr. Gillespie: I cannot hear.

The Court: Speak up. Mr. Gillespie cannot hear you.

Mr. Wright: And the purpose of the letter is to state, to summarize, the arrangements that had been reached for cutting down the interrogatories, and the letter goes right down the list of changes and modifies the interrogatories in these respects.

Then when it came to the interrogatories I have referred to, as to subsequent-run New York, this is what the letter says:

257 This refers to interrogatories 1-F and 1-I. 1-F is the total gross rentals and net rentals from exhibition in the New York metropolitan area.

This paragraph states:

'In view of the detail that would be required in supplying this data for each of the one-third of the pictures selected in interrogatories 1-C and 1-D, the modification as to those was to the effect that as to the national figures, it would be agreeable to give us every third picture instead of the data for all of the pictures from exhibition"—

The Court: You want to read in some more of this letter? You are reading now from the letter?

Mr. Wright: Yes.

This is from Mr. Krieger's letter to Mr. McDonald of February 21:

"In view of the detail that would be required in supplying this data for each of the one-third of pictures selected in interrogatories 1-C and 1-D, the modification as to those was to the effect that as to the national figures, it would be agreeable to give us every third picture instead of the data for all of the pictures, and from exhibition in the New York metropolitan area and the City of Chicago"—

258 1-D referred to the City of Chicago, or, rather, I, I believe—"it would be satisfactory for each dis-

tributor defendant to supply, first, the total rentals for each of the one-third of the pictures selected in interrogatories 1-C and 1-D from the New York exchange and the Chicago exchange and, second, the total rentals derived from theatres in the New York metropolitan area as defined in the complaint and in the interrogatories and in the City of Chicago on one top grossing picture, one lowest grossing picture, and the picture which is the median in terms of film rentals for each of the four seasons covered by interrogatory 1, or a total of twelve pictures for each distributor defendant.

"In determining which three pictures to select for each season, national film rental figures shall be used."

There is other data in there that relate to other parts. I won't read it at this time.

The Court: You modified the request for information.

Mr. Wright: Yes, and this is Mr. McDonald's response to that letter:

"I have your confirmation that the RKO defend-
259 ant will supply as much information as possible by March 26th." This first paragraph simply relates to time.

The modification is dealt with in the second paragraph in the following terms, that is, a three-picture samples:

"In thinking further of the interrogatories as modified it occurs to me that for all purposes a different selection of the three pictures per season might be advisable. As at present worded our agreement would be to furnish figures for the metropolitan area for the top, bottom and median pictures for each season and we shall do that, if you prefer. It does seem to me, however, that a more representative set of figures would be obtained by dividing the pictures per season into groups according to their national gross, and giving you the metropolitan area figures on the median picture in the top fourth and the bottom fourth and the group as a whole. You would then have figures that would not be affected by the fact that

in a particular season one feature released by RKO was outstandingly good or bad.

260 "We shall do the job as you elect, and shall appreciate your letting me know if you prefer to stick to the original plan."

Copy of this letter went to all the eight.

Then this is the response of Mr. Krieger to Mr. McDonald:

"Dear Roy:"—this is dated March 2, 1951.

"Your proposal with respect to a different selection of the three pictures per season as more representative is entirely acceptable; and since it is important that the criteria be used by all the distributor defendants it occurred to me that the best way for me to handle this would be to set forth in this letter a revision of my letter of February 21, 1951, to you.

"Therefore, the following changes to be made on page 3 of my letter dealing with interrogatories I (f) and I (i), second full paragraph on page 3, consisting of 14 lines is to be deleted, and the following substituted in its place:

" 'In view of the detail that would be required in supplying this data for each of the one-third of the pictures selected in interrogatories I (c) and I (d) from exhibition in the New York metropolitan area and the City of

261 Chicago, Illinois, it would be satisfactory for each distributor defendant to supply first the total rentals for each of the one-third of the pictures selected in interrogatories I (c) and I (d) from the New York exchange and the Chicago exchange; and second, the total rentals derived from theatres in the New York metropolitan area as defined in the complaint and in the interrogatories, and in the City of Chicago on each of three pictures for each of the four seasons covered by interrogatory I, or a total of 12 pictures for each distributor defendant. The three pictures for each season shall be selected as follows: Each distributor defendant should divide its pictures per season into groups according to

their national gross and the three pictures shall be selected as the median picture in the top quarter, the median picture in the bottom quarter and the median picture in the group as a whole.'

"I note that you have sent a copy of your letter of February 28, 1951, to all defendants. I am therefore sending a carbon copy of this letter to the attorneys for the other seven distributor defendants.

262 "You understand, of course, that this change that is being made is a change that affects the selection of pictures for all distributor defendants, and does not give them any option in the matter since it is important that the same criteria be used by all in selecting the pictures. I assume that upon receipt of the copy of your letter to me of February 28, 1951, each distributor defendant has waited for my response before moving forward with the compilation of the data and therefore it is not likely that there has been a great deal of work already done on the old basis."

The Court: What do the answers to interrogatories say?

Mr. Wright: The answers to interrogatories for Loew's say:

"Answers on behalf of defendant Loew, Incorporated to interrogatories propounded by the plaintiffs as modified by agreement between counsel for the parties."

The Court: Give me the answers to those particular interrogatories as modified in this letter.

Mr. Wright: The answers are contained in schedules that are attached to this preliminary statement

263 here.

The Court: Which schedule?

Mr. Wright: The schedule which contains the data as to the 12 features is the statement on page 3 of the answers. It says:

"Schedule C-1 shows as to 12 pictures selected as hereinafter described the total film rental claimed to be derived

from a distribution of each of such 12 pictures in the New York metropolitan area as defined in the complaint and the total film rental from the distribution in the City of Chicago.

"The 12 pictures so shown have been selected as follows: The defendant has divided its pictures in respect of each season's product in accordance with their national gross. The three pictures per season have been those chosen, one being the middle or median figure from the top quarter of the season's product, one being the middle or median picture from the bottom quarter of the season's product, and the third being the middle or median picture of the season's product as a whole."

That same procedure was, of course, followed 264 by—

The Court: Does it list the pictures there, names of the pictures?

Mr. Wright: Yes, the titles of the pictures are listed and the season for each.

The Court: That schedule shows what the total national gross was of that picture and the New York metropolitan gross, is that it?

Mr. Wright: This schedule shows only the New York metropolitan and City of Chicago. There is another schedule which shows national gross of those pictures. This one, for example, says, the three pictures for the 1949-50 season were On the Town, for the New York metropolitan area rental is $475,000-odd; the Doctor and the Woman, the middle picture, metropolitan area was $82,000-odd, and the low median was Dan, $33,000.

The Court: In respect to the New York metropolitan area gross, does that include first run?

Mr. Wright: No, this, as I understand it—

The Court: Not what you understand it, but what does the figure represent? Does that represent the entire gross from the New York area including first run?

Mr. Wright: Well, I will have to have Mr.
264a Gross answer.

The Witness: Yes, it does include the first run.

The Court: It does include the first run?

The Witness: They also supplied other information in those schedules which gave the first run and I was able to eliminate it.

The Court: Which schedule gives the first run figure?

265 The Witness: They have a list of the pictures here and give you the theatre, the picture, the play date, the gross receipts and the rental for first-run Broadway, Manhattan, New York City.

The Court: What is the number of that schedule or the page?

The Witness: Schedule D.

The Court: All right. Then you got another schedule which shows the national revenue?

The Witness: That's right.

The Court: What is that schedule?

The Witness: That would be Schedule B, where they list the number of bookings and the total film rentals.

The Court: All right. I think that gives a clear picture of that.

By Mr. Wright:

Q. Can you tell us what if any check you yourself made to satisfy yourself that those twelve pictures were a representative sample of the Loew's product for the purpose of determining what came out of the New York metropolitan area? A. I did this for each of the companies, and of course this chart reflects the com-
266 bination of the eight companies.

The Court: By "this chart" you mean Exhibit 10 for identification?

The Witness: Yes.

A. (continuing) That represents the aggregate of the eight.

Now I analyzed each of the companies separately to build up to this figure, and as you pointed out, in the interrogatories they supplied for these particular pictures, they supplied not only the New York metropolitan and the first-run and the national, but they also supplied some other information.

One piece in particular was the New York exchange area.

Also in their interrogatories you point out that they supplied us with information on many other pictures, one-third of all their pictures actually, where they did not take the trouble to build up the New York metropolitan alone but they did give us the New York exchanges and the national and the first-run on those pictures.

So my first test was to see at least whether these twelve pictures had any comparison or comparative basis to the much larger sample, every third picture.

267 The closest approximation that I can get to the New York metropolitan area is to take the larger area, the New York exchange area, and I found that with respect to all the companies—

Mr. Gillespie: Your Honor—

The Court: Let him give his answer. Go ahead.

A. I found that with respect to all the companies the percentage of the exchange to the national on every third picture for a close relation to that ratio, the exchange—I am forced to use the exchange rather than the metropolitan—I don't have the metropolitan figures for all these other pictures, and that is the closest approximation I can get to it to test its validity, and I found that the sample of twelve from each company was comparative to the sample of one-third from each company in the exchange to the national, and on that basis I assume in the first instance that it is a fair sample of the performance of the larger group.

Now, further, of course, as you point out in the interrogatories, these pictures were not selected haphazardly or alphabetically. They were arranged and the
268 attempt was made to select a picture from each section of the program to give the sample—stratafied sample—that it would cover as much of the program and represent as much as possible.

Further than that, I obtained a report put out by the Department of Commerce, U. S. Census of Business—1948, Trade Series, The Motion Picture Trade, where the Census Bureau apparently analyzed the motion picture business and one of the schedules supplied—

Mr. Wright: We had better mark what you are talking about for identification. I ask that this U. S. Census of Business—1948 Trade Series—The Motion Picture Trade, published by the Department of Commerce, be marked for identification with the next number.

(Plaintiffs' Exhibit 21 for identification marked.)

The Court: What does that say on there that you used?

The Witness: Well, in some of the tables in here they show the motion picture industry as a whole, the breakdown of the rentals by exchange area. They don't give you the percentage, but you have the total.

269 By Mr. Wright:

Q. What page are those tables at? A. I will give you that now. (Inspecting)

Table 1, pages 6 and 7.

The Court: What does that show?

The Witness: This is Table 1. The motion picture film distribution, United States, by type of distributor and exchange center, and they give it to you in thousands of dollars for each exchange and you have the total for the exchanges, and that—I took the percentage of the New York exchange to the total and satisfied myself that the figures that I had received, which purported to be repre-

sentative samples, certainly with respect to the closest approximation of the New York exchange to the national, matched up with the Bureau of the Census and whatever figures I had in the reports.

Mr. Gillespie: Your Honor, I move to strike all of this testimony commencing with the comparison with the New York exchange. In the first place, the New York exchange area covers an area including Northern New Jersey, it covers an area far beyond the New York metropolitan area as defined, in the State of New York. So that you
270 have a great many other theatres, a very much more substantial area involved.

I further move to strike the testimony, particularly that which refers to the census statistics. We have no idea what the basis of their compilation is or anything else. We cannot very well cross-examine a document.

The Court: You can certainly examine the document and examine from it. I think the points you make are points to beclarified on cross-examination rather than to strike the witness's answer. I deny your motion to strike.

You may continue.

Mr. Wright: That is all we have at this time on these ratios. I do not know whether your Honor wants to have him turn to another chart or whether you want cross-examination on this at this time.

The Court: I will leave that to you. Do you want to go on with others and have all the cross-examination at the end of it?

Mr. Wright: That is perfectly agreeable to me either way. I want to meet the convenience of the parties and counsel.

The Court: You can do either one, continue or not.

271 By Mr. Wright:

Q. Mr. Gross, as I understand it, you also prepared the data which is reflected in that chart there that has been marked for identification as Exhibit 5, anyway, the chart

headed "First and Second Neighborhood Run Theatres Operated by Loew and RKO Circuits in Boroughs of Manhattan, Brooklyn, Bronx and Queens." A. Yes, I did.

Q. And that data came from where? Just tell us how that was prepared. A. For the year 1945, the bars on the extreme left, the number of theatres there, came from the RKO Exhibit 4 in the Paramount case, which I think was identified earlier by Mr. MacMillen. Those maps showed each of the theatres in the five boroughs. It showed the run on which they played at that time and the operators of the circuits, and I took off the theatres that were indicated as first or second operated by Loew and RKO. Thirty-three first neighborhood in those boroughs for RKO, 36 for Loew. One theatre on that map indicated a second neighborhood for Loew—for RKO—excuse me, and 21 for Loew.

For 1946, 1947, 1948, 1949 and 1950 I counted the
272 number of theatres that were supplied in answers to interrogatories by the Loew circuit and the RKO circuit, where they gave the information as to the theatres they operated in those areas, and the run on which they played, and I merely counted them up, and, as you see there, compared the chart.

Mr. Wright: We offer that Exhibit 5, I believe it is, in evidence.

The Court: Any objection?

Mr. Wright: It is the exhibit headed "First and Second Neighborhood Run Theatres Operated by Loew and RKO Circuits in Boroughs of Manhattan, Brooklyn, Bronx and Queens for the Years 1945 Through 1950."

Mr. E. Raftery: Your Honor, we don't object to it, subject to our right, if we find any errors in the computations, we will point them out later and correct the exhibit.

The Court: It will be received in evidence.

(Plaintiffs' Exhibit 5 for identification received in evidence.)

Mr. Wright: I do not believe that map which was marked for identification as Plaintiffs' Exhibit 6, on which the first year is based, has been received, and I will also offer that.

273 Mr. E. Raftery: I see no necessity for encumbering the record. It proves exactly the same thing.

The Court: Do you need it?

Mr. Wright: That has somewhat more data on it.

The Court: Does it prove anything other than what you have got in Exhibit 5?

Mr. Wright: Well, I think that it does this: it proves that, of course, what is there on Exhibit 5 as to 1945 was before the Court in the Paramount case.

The Court: That has been accepted as true, so I do not think you need it. I see no reason for putting in that exhibit.

By Mr. Wright:

Q. Mr. Gross, as I understand it, you also prepared the data which is reflected in the chart headed "Division of Eight Major Distributors' Product Between Loew and RKO Metropolitan Circuits, 1948-49 as shown by Film Rentals paid by Circuits." Is that correct? A. Yes, sir, that is correct.

Mr. Wright: I am referring to Plaintiffs' Exhibit 9 for identification.

274 The Court: All right.

Q. Will you tell us, Mr. Gross, where you got that data from. A. This data was supplied entirely from the interrogatories—the interrogatory answers supplied by the Loew and RKO theatres. Those answers were to show each picture they exhibited on the circuit for the years 1946 through 1950. They were to indicate the pictures they showed, the distributor whose picture it was and the film rental they paid. RKO supplied a schedule very complete, apparently, that covered every picture that played on the circuit, with its distributor and the film rental.

Q. That is for what period? A. For the period from October of 1946 through October 1950.

Q. These answers you are referring to are the answers made in response to the second part of the interrogatory that is already in evidence here as Plaintiffs' Exhibit 12? A. Yes.

The Court: The blue is the RKO and the red is Loew; is that right?

The Witness: Shall I explain that to you now?

275 The Court: What does the blue represent on there?

The Witness: What we do here is we take each distributor individually. Across the bottom you will notice the names RKO, Warner, et cetera. This chart attempts to show that of the rental received by each distributor from only the Loew or the RKO circuits, that is the only thing that it is concerned with, of the combination of RKO and Loew's circuits rentals paid to RKO distributors from the figures that were handed to me by the interrogatories, RKO got all the circuit rental from the RKO theatres.

With respect to Universal, of the total 100 cents on the dollar that Universal got from either of these two circuits alone, you add up the money they got from both of them and you take the percentage they got from Loew, you find that 50.2 percent of the money they got of all the circuit rental came from Loew and 49.8 percent came from RKO circuit.

Similarly with the Loew distributor. They rentals that they received from either Loew or RKO, throw them all in one package and you find that Loew's circuit represents

97.8 percent of the rental paid to Loew for playing

276 pictures in either of these two metropolitan circuits, and RKO paid 2.2 percent of what Loew got out of the circuits.

The Court: What this shows is that of the pictures

shown in the Loew's theatres, the Loew's circuit; is that it?

The Witness: The Loew's circuit or RKO circuit alone, apart from anything else in New York. Only the Loew and RKO circuits, and they played these distributors' products, and I am attempting to show here that of all the pictures that Loew and RKO circuits reported to us that played on their circuits and the rentals they paid, that RKO circuit paid to the RKO distributor all the money that RKO got out of either circuit, which means simply that RKO, according to these answers, did not play their pictures on the Loew circuit.

Similarly Warner, similarly Fox. With respect to Universal, from the figures that I had, it indicated that the Universal product, at least dollarwise, was split between Loew and RKO, and it indicates further that the 97.8 per cent of the Loew distributor—97.8 per cent of the rentals it got out of either one of these circuits, 97.8 came out of Loew and 2.2 from RKO, and the other
277 figures I think follow.

The Court: This is just the eight major distributors and it adds up to 100 per cent?

The Witness: Only 100 per cent by each distributor. For example—

By Mr. Wright:

Q. The Judge's question was directed to the fact that both of those circuits did, of course, pay film rental to distributors other than the eight you have on the chart. A. Yes.

Q. And each of those distributors, I take it, also received film rental in New York from theatre circuits other than those operated by RKO and Loew? A. This chart only concerns itself with Loew and RKO payments.

Q. It is confined to the rental payments made by those two circuits, as I understand it, and also the payments

made by them to these eight distributors? A. That is correct.

The Court: Is this one complete unless you show how much was paid to other distributors?

Mr. Wright: That is the next chart.

278 The Court: Maybe that will come along on the next chart. I am just trying to get at the facts here. I think I understand.

Mr. Wright: As soon as I finish with this one I will get on to that.

The Court: Sure, you go ahead and finish it.

By Mr. Wright:

Q. I wanted to have you tell the Court what the limitations were on the data you got. As I understand it, you received from RKO the playoff on the circuit for the period 1946 through 1950 in more or less complete form? A. That is correct.

Q. And that was what was requested in Section 2 of these interrogatories? A. That is right.

Q. But as to Loew, did you get data for any more than one season? A. Well, as a result of long correspondence I ended up with data, with what purported to be complete data, from Loew only with respect to the 1948-49 season, and with respect to that season itself Loew supplied, I think, 102 pictures which were the principal features

279 exhibited on the circuit. That is what is commonly known as the long half of the Loew circuit.

Q. Let me understand what you mean by that. As to Loew, the data you got was confined to the 1948-1949 season; is that correct? You were not supplied with any other season's playoff by Loew; is that right? A. There were some other data but there was no other season complete. There were some selected pictures that we asked the rentals on.

By the Court:

Q. You estimated as to Loew? A. No.

Mr. Wright: The chart is confined to the 1948-49 season. I am just pointing out why it was so confined.

The Court: All right.

By Mr. Wright:

Q. As I understand it further, from that data you got from Loew for the 1948-49 season, you say that did not appear to include all of these pictures of the defendants that played the circuit? A. No. As I understand it, they had a long half and a short half and the principal pictures are exhibited on the long half and the figures they
280 supplied apparently covered only the long half of the week.

Q. How many pictures were there that they played? A. They reported, I think, 103 or 104 pictures and the rentals indicated that they were the principal pictures on the circuit.

Q. Will you just say what you meant by long half, short half? I don't think that term means anything to any of us by itself. A. Customarily and generally speaking, the Loew theatres divide up their week in what they call the long half, which comprises five or usually six days, and there is a change of program in some of the theatres at this time; there is a change of the program in the middle of the week where the pictures are played on a five or six-day-long half most all including the weekend.

More people came to them in the five or six days than the midweek short half. One or two days was considered the short half, and there is a double bill in there, too.

Not all the theatres played long and short half all the the time. Some of them had one-week plays, as I recollect, and some of them had the short half.

281 The Court: You say in computing this you just used the long half?

The Witness: The long half of the five or six-day week.

By Mr. Wright:

Q. I take it you used what you had? A. I took all that I had.

Q. Is that correct? A. That is correct.

Q. There was nothing omitted there that you had?

The Court: Ask the next question.

Mr. Wright: We will offer that chart.

The Court: Any objection?

Mr. Raftery: Yes. Might I examine the witness preliminarily.

The Court: I think so. On this chart I will let you examine him.

Preliminary examination

By Mr. Raftery:

Q. You have not included in your computations here any of the RKO, Warner or Fox pictures that were played in the Loew houses in the metropolitan area? A. Well, the only information I had, Mr. Raftery, was the list of pictures they gave us for the 1948-49 season. They
282 did not have any RKO, Warner, Fox pictures in there.

Q. In other words, you had a very incomplete list from Loew's of the pictures they played in the Loew's circuit during that year? A. I had an incomplete list. I had the principal pictures, I think.

Q. What you had were the long half pictures in the first neighborhood runs? A. I had the long half pictures on the circuit, as I understand it.

Q. Did you have any pictures from the Spooner Theatre, for example, in the Bronx? A. Well, they gave me an aggregate film rental, the total film rental, paid to the distributor for the picture. Whatever they termed as aggregate film rental on the circuit, that is what I had.

Q. Don't you know, having worked for Columbia in the branch office here, that the Spooner Theatre in the Bronx played RKO, Warner, Fox and many other pictures besides

the Loew, Paramount, United Artists and Columbia; don't you know that? A. No, I don't know that.

Q. And there are a number of Loew theatres around the city that played RKO, Warner and Fox pictures;
283 isn't that a fact? A. I don't know.

Q. You don't know? A. No, sir.

Q. In other words, you are not familiar with the playoff in the metropolitan area? A. I am generally familiar with it.

Q. But you have no knowledge what the two large circuits played in the neighborhoods, in the large theatres operated by the RKO and the Loew's circuits? A. The only thing I do know is that this is what the RKO circuit said, that they paid an aggregate to the distributor for these pictures. Now, what they included I presume was the total rental paid.

Q. How many distributors did you find that RKO paid film rental to during this period? A. That RKO paid?

Q. Yes. You only listed eight. How many more? A. On this chart.

The Court: How many did they pay film rental to during that period?

The Witness: Offhand I don't remember.

The Court: What was the data you received? Did
284 it show that?

The Witness: Yes.

By Mr. Raftery:

Q. Do you have that data here? A. We will come to that in another chart.

The Court: Get that out. That may have some bearing on this chart.

Mr. Raftery: I object to this chart as being incomplete. It certainly doesn't give the picture at all.

The Court: Show the witness the next chart and maybe he can answer your question a little more.

Mr. Wright: I will identify the next one and he can examine on both.

I will ask—

The Court: We are not identifying that chart yet. This is examination by Mr. Raftery.

By Mr. Raftery:

Q. This paper that has been handed to me, where does that show the number of distributors that actually received film rental from RKO during this four-year period? A. You are referring to this chart?

285 Q. Yes. Where is the number of distributors? A. They are thrown into a group called "All others."

Q. Where is the information that you have on "All others"? What could the "All others" amount to numerically in this area? I would have to count them.

Q. Have you got it here so you can count them? A. We have the answers to the interrogatories.

Q. All right, take it. A. We had better take a recess. It will take some time.

The Court: We will take a five-minute recess.

Mr. Raftery: I want Loew's, too.

The Court: Look at RKO and Loew's.

(Short recess.)

By Mr. Raftery:

Q. We have a pending question, I believe.

As I recall it, I asked you to tell me how many distributors did the RKO Theatres pay film rental to during the period referred to on your chart here, Exhibit No. 9. A. Well, this chart covers only the 1948-9—I guess I

286 misunderstood. I took the distributors that their answers showed whose pictures they distributed over the four years, and I counted 25 distributors other than the eight here.

Q. In other words, RKO licensed— A. Over four years.

Q. —during the four-year period, of which 1948-49 is one of the years, motion pictures from 33 different distributors; isn't that a fact? A. Twenty-five and eight, 33.

Q. Now, in connection with this 1948-49, in Loew's answers to the interrogatories they referred to the Spooner Theatre, did they not, and gave you the information in regard to the Spooner Theatre in the Bronx? A. They supplied information theatre by theatre, picture by picture, for certain weeks designated, yes.

Q. And looking at schedule H-6 of the answers to the interrogatories, that refers to the Spooner Theatre, does it not? A. Yes, sir.

Q. What distributors, among others, did Loew
287 pay film rental to? A. At the Spooner?

Q. At the Spooner during that year.

The Court: Is the Spooner a first-run neighborhood theatre?

Mr. Raftery: It is one of the theatres right here on the list.

The Court: It is a first-run neighborhood theatre?

The Witness: It is marked here as second-run neighborhood.

The Court: All right.

A. This is from 1949 through 1950, I presume.

Q. Right. Warner Bros., Fox, Monogram, Columbia, RKO, Warner Bros., Film Classics, RKO, Fox, RKO, Fox, Universal, Fox and RKO.

Now, weren't there a number of those so-called second neighborhood run theatres operated by Loew's, according to this schedule which has been put in evidence by your counsel, operating during this period? A. Yes. This is one of the theatres that is in that period.

Q. And in 1945 you have 21; right? A. That's correct.

Q. And you have 14, 14, 14, 13, 13, down through
228 the list? A. Spooner would be amoung the second neighborhood column.

Q. The second neighborhood runs all played RKO, Warner, Fox, just like the Spooner; isn't that a fact? A. I don't know if that is a fact.

Q. Did you investigate to find out if it was a fact? A. I did not.

Q. And when you made up this chart of all these 100 per cent, you completely ignored the proposition that Loew's was buying RKO, Warner's and Fox in at least some of the theatres listed on this schedule here? A. Well, the information that I had, we asked for a complete year and we settled on 1948-9, and they gave us 104 pictures for 1948-9 and there were no such distributors in that year and that is what the chart says.

Q. In completing your investigation to make up these charts, then, you will admit on being shown this that this is an incorrect picture as far as the payment of film rental to RKO, Warner's and Fox is concerned
288a for this period? A. It is not any more than it says it is, Mr. Raftery. It says for 1948-9 data from interrogatory answers, these are the pictures and these are the rentals.

I don't say that it includes every film rental paid by Loew to every distributor.

289 Q. Well, will you vouch that it is accurate? A. It is accurate to the figures I have. I am sorry.

Q. But will you vouch that it is accurate so far as the actual facts are concerned? A. Well, I have no actual knowledge of the facts. I would suggest that there may be small pieces in the bottom, where I wouldn't estimate the amount, where there would be some red on the other chart. No question about that.

Q. Did you find out how many other distributors Loew's — A. Well, I have six for that 48-49 season, six of them.

Q. Six others besides those listed here? A. Yes, Republic, Eagle Lion, Monogram, Screen Guild, SRO, Film Classics, yes.

Q. Have you any idea of the amount of film rental that RKO theatres paid to Eagle Lion during the four-year period, 1946 to 1950, in money? A. In money?

Q. Yes. A. I think I can find it.

Q. Have you got it handy? A. Percentagewise—no, I wouldn't have a complete figure at this moment. I

290 have some of the rentals but they aren't complete.

Q. Was it $100,000? A. For the four years, from RKO to Eagle Lion, $287,859.

Q. How about PRC? A. Well, that would include the PRC pictures that were included in our—those PRC pictures that were in 196 are in there.

Q. That was for neighborhood runs only? A. That was the rental paid by RKO to Eagle Lion irrespective of how they played.

Mr. Raftery: Your Honor, I am going to object to this exhibit, first, because it is incomplete; second, it is misleading; and third, the witness had only partially—part of the facts from which to construct the exhibit, that is, he didn't have the full data in regard to the playoff at the Loew's theatres. He said he had the full data in regard to playoff at the RKO theatres. And I don't think the exhibit is helpful. I think, if anything, it is misleading; that the actual playoff is the thing that tells the story, and the actual payment of the actual money.

The Court: Mr. Gillespie?

Mr. Gillespie: Your Honor, I just wanted to ask

291 Mr. Gross:

Preliminary Cross-Examination

By Mr. Gillespie:

Q. If there aren't a substantial number of additional theatres than those questioned by Mr. Raftery which showed RKO, Warner pictures in the year 1949. I show you here they played second neighborhood run the Apollo, the Dyckman— A. This is for the year 1949-1950, is that right?

Q. This begins in October, October 5, 1949. A. And runs through October, 1950?

Q. Runs through that year, that is correct. Warner Bros. A. Yes.

Q. Fox? A. Yes.

Q. RKO? A. Right.

Q. The Brevoort. A. Theatre?
Q. Theatre. A. Yes.
Q. Show Warner Bros., Fox— A. That is right.
Q. (Continuing) —RKO? A. Yes, sir.
Q. You had this material— A. That is right.
Q. —from the beginning in answer to interrogatory H—is it not?—or is it on schedule H? A. Yes,
292 Schedule H, 62 sheets.

Q. In answer to the original interrogatories? A. That is correct.

Mr. Gillespie: Your Honor, I object to this exhibit on the same grounds as Mr. Raftery, because it is inaccurate, and, I believe, it is misleading.

The Court: Let me ask you, Mr. Gross: When you made up Plaintiffs' Exhibit 9, were you trying to show where the Loew and RKO theatre circuits used just the eight major distributors' product?

The Witness: No, sir. With respect to the eight major distributors, we were trying to show how they derived their rentals from the circuits. It just concerned itself with eight. We have another chart, your Honor, that will show the rest of the rentals, but I have concerned myself here on the rental to eight distributors.

Now, RKO supplied very complete rundown on the rentals they paid, and we tried to get the same information from Loew's for the four years and they settled on one year and, as I testified earlier, that one year itself was incomplete. That is all I had to work on.

293 The Court: Do I gather from Plaintiffs' Exhibit 9 that you are saying that RKO received 100 per cent of its film rentals from RKO theatres?

The Witness: As opposed to what other rental they may have received from Loew. This is merely the combination of the rentals paid by Loew theatres and RKO theatres. So that what you would do—excuse me—you would take RKO distributors and you would say, "What do they get from the RKO circuit?" "X dollars."

"What do you get from the Loew circuit?" "Zero." So the combination is the same as the RKO circuit, which is 100 per cent.

The Court: As a matter of fact, the RKO circuit in 1948-49 only paid 24 percent of the film rental to RKO, did it not?

The Witness: That is correct. They paid some other rentals to Warner, paid it to Fox and so forth, as indicated.

The Court: Then you are comparing, on this Plaintiffs' Exhibit 9, merely the relationship between RKO and Loew's rental paid and are not showing what actually was the rental paid to various distributors including RKO chain, are you?

294 The Witness: Maybe this chart should have been introduced first, and then you go from the general to the particular, perhaps is the better way, but I don't purport to show anything else but these distributors and those circuits.

The Court: I will take the exhibit for what it is worth, but I don't think it presents a very fair picture, if I may say. I will receive it in evidence for what it is worth.

(Plaintiffs' Exhibit 9 for identification received in evidence.)

Mr. Wright: I am going to ask to have marked for identification, as the next exhibit number, the exhibit which shows the distribution of film rental paid by the RKO and Loew metropolitan circuits. This is the full film rental appearing in the answers as distributed among the various distributors who received it, both the defendants, the plaintiff and other distributors.

(Marked Plaintiffs' Exhibit 22 for identification.)

The Court: Any objection to that exhibit?

Mr. E. Raftery: Well, subject to correction.

The Court: Any objection to this exhibit 22?

295 Mr. Gillespie: Subject to correction, your Honor.

The Court: I will receive it in evidence subject to correction.

(Plaintiffs' Exhibit 22 for identification received in evidence.)

The Court: Now you may ask some questions, if you wish.

Do you want to ask any questions to develop it?

Mr. Wright: I think it would be helpful to understand precisely what we have here.

Direct Examination resumed

By Mr. Wright:

Q. Those charts you have on this exhibit, you show four seasons for RKO and only one for Loew's, I notice. Can you tell us why that is. A. The reason is the same reason as on the previous chart: RKO supplied what appeared to be a complete rundown on every picture, every theatre that they had. This is season by season. And the only season from Loew that even approached being complete was the 1948-49 season and the data that I have for the 48-9 is reflected on this chart.

Q. I take it those pie charts for RKO do show the distribution of the total rentals paid by the RKO
296 circuit during those seasons to all distributors, is that correct? A. That is correct.

Q. But the Loew circuit figure there, as I understand it, suffers from the same infirmity as the Loew circuit figures on the other chart; that is confined, really, to what you called those long-half features, 103 features, they gave you for that season, is that correct? A. That is correct.

Q. Those are figures there of Fox, RKO, Warner, et cetera, that you see in the charts. Those names represent in that case, the distributor, that is, RKO figure 20.7 per cent, 1949-50, that is RKO, the distributor, that received that, RKO Radio Pictures, is that correct? A. That is correct.

Q. And the rental was paid by the RKO theatres? A. That is correct.

Q. Then I notice that you have also shown on there the percentage of film rental the circuit paid that went to Eagle Lion. That is shown in gray, is it, on these charts?

A. Gray, that is correct.

297 Q. And then you have a white segment there marked "All Others." That shows, does it, the rentals that were paid to these distributors that Mr. Raftery had you add up as distributors— A. That is correct.

Q. (Continuing) —that others were paid to. How many of those were there? A. We had counted, for RKO, 25 distributors.

Q. That 25, I understand it, is over the entire four-year period? They may not have played all those 25 in any of those particular seasons? A. No, the actual names of others may be somewhat different each year, depending.

Q. But you don't know how many of those got in in a particular year? A. No, I didn't analyze it.

Q. That does appear in the interrogatory answers? A. Yes.

Q. If anyone wanted to supply it? A. Yes.

Q. You also show, as I understand it, on there in those RKO circuit figures, you have set out in percentage terms, the payments to some of the distributors apart from the chart. Why was that? There is not room enough

298 on there? A. It is difficult to read these figures as they stand now. If I had inserted them in there, why, it would be very difficult to read, so we pulled out the figures that should go into these bars.

Q. Those Loew, Paramount, Columbia, United Artists figures are shown in five very different colors that apply to these distributors? A. Yes, Loew's red consistently, and that is one—

Q. And the percentage— A. Green is Paramount, and that is 7.1 per cent.

Q. The percentage figures that you have there apply to the color segments? A. That is correct.

Q. As shown on the chart. As I understand it, again, that All Other figure in the Loew circuit rental payments chart, that represents the share of the Loew circuit rentals that those five distributors you found Loew's—five other independents—Loew's had played during that season, does it? A. That is correct, five or six—six, yes.

Mr. Wright: I think that is all I have on that chart.

The Court: All right.

299 Have you finished with this witness?

Mr. Wright: We haven't finished with the witness. I don't think we can finish with him until we call the gentlemen—

The Court: But subject to his being recalled for something else, you are through, so he can be cross-examined?

Mr. Wright: (Continuing) —who prepared the interrogatory answers.

Yes, he will have to come back.

The Court: That is all right.

Mr. Raftery, you may cross-examine.

Cross-Examination

By Mr. Raftery:

Q. I show you Exhibit 11. You prepared that exhibit, is that a fact? A. Yes, sir.

Q. And, now, as the first item, first picture is Kit Carson; that was a reissue, was it not? A. Yes, sir.

Q. That was the highest grossing picture you had of all the Eagle Lion products for your first season, is that not a fact? A. That is correct.

Q. That picture was originally distributed by

300 United Artists maybe ten years before you released it? A. I don't know who distributed it. I don't know the original distributor.

Q. It wasn't any small picture; you know that? A. At this moment I don't recall, but I am not clear on it.

Q. But it was an old, old picture? A. I don't know exactly how old it was, but it was a reissue, certainly.

Q. That was the highest grossing picture you had, anyway, of that whole year's product, isn't that a fact? A. Yes, sir.

Q. The second one is another reissue, The Last of the Mohicans? A. Yes, sir.

Q. How many reissues did you have on that first page? A. Eight on the first page.

Q. How many are there on the first page? A. 40.

Q. Eight out of 40 were reissues? A. That is correct.

Q. Going to the second page, the last and lowest grosser you had that year was the picture called Panhandle
301 Trail, is that right? A. That is correct.

Q. How many reissues did you have in that group down to Panhandle Trail? A. You mean the balance of that year?

Q. Balance of that year. A. Two more.

Q. Not one of those reissues ever had a first run on reissue in New York City, isn't that a fact? A. Not according to our records.

Q. Do you have the initial W on your sheet there anywhere after the names of any of your pictures? A. Maybe I put them on my own copy.

Q. Yes; you gave them to me, I know. A. No, I don't have it here.

Q. A great many of these pictures were so-called westerns, were they not? A. There were some westerns. I would like to count them with you.

Q. Have you got a list there that would show how many were westerns as distinguished from regular features? A. Maybe we can use yours. Is yours marked, if I marked it?

Q. Yes. A. You have something, I am sure.

302 Q. Do you remember during the deposition you marked every one of these that were westerns? Will you count the number of westerns you had during the first year. A. 20.

Q. 20 of them and how many reissues did we say before in the whole year? A. Eight and two more, 10.

Q. 10. How many pictures did you release that year, 40 plus what? A. 40 plus eight, 48.

Q. Of 48 10 were reissues and 20—is that right? A. Well, we just counted them.

Q. 20 were westerns. So that is 30. How many foreign-made pictures did you have that year? A. None, as far as I know.

Q. In other words, no Eagle Lion came through to you that year? A. No, sir. There were no foreign pictures that year, that is correct.

Q. Now, you referred this morning in your testimony to getting some first-run film rental on this first season's product, and also to the theatres. In what theatres were any of these pictures exhibited first run
303 in the City of New York?

The Court: First year?

Mr. Raftery: In the first year. Just the first year's product. A. Want me to read them? Columbia—repeat them as they appear—

Q. No, just give us the names. A. Columbia, New York, Rialto.

Q. And that is all, isn't that a fact? A. That is all.

Q. Those were generally known as second-class first-run theatres at that time? A. You asked me a question?

Q. Yes. A. Oh yes, yes.

The Court: Where was the New York theatre?

The Witness: I think it is on 42nd and Broadway. Around in there.

Mr. Raftery: It is back of Toffenetti's Restaurant, with the entrance next to it at 43rd and Broadway, on the site of the old George M. Cohan Theatre.

Q. And that is a small theatre, is it not? A. I have never been in, but it doesn't look very big.

304 Q. Let us go to the second year. What was the highest grossing picture? A. T men.

Q. That was made by an independent producer named Eddie Small, isn't it a fact? A. I don't know that.

Q. You are not familiar with those pictures yourself? A. No, sir.

Q. All you know are the figures? A. I have the titles and I have the rentals. Didn't see any of them.

Q. You aren't familiar with the quality of the pictures in any respect? A. Those that I may have seen I would have some opinion of the quality, my own personal judgment.

Q. Let us take T Men. A. I didn't see T Men.

Q. Never saw it? A. No.

Q. And that was your biggest grossing picture? A. Yes, sir.

Q. That grossed how much money? A. $1,236,400 in the United States.

Q. Was that the first one of the first Eagle Lion pictures to have a representative first run in a first-
305 class Broadway theatre in the City of New York?
A. I don't have the first-run play date. The theatre that played it was the Criterion Theatre on Broadway.

Q. In New York City? A. New York City.

Q. What film rental did you collect from the Criterion Theatre for that first-run? A. $17,800.

Q. Isn't it a fact that that picture played long half playing time across the entire Loew metropolitan circuit? A. I will just check it to be sure I am right.

Q. You put the contract— A. Yes, my recollection is that it did.

Mr. Gillespie: You put the contract in evidence yesterday.

Q. And played on percentage under the contract? A. T men, yes, sir.

Q. And you received from the Loew circuit a very substantial amount of film rental for that picture, isn't that a fact? A. That is correct.

Q. How much film rental did you receive? A.
306 It played another one of our pictures in combination. Would you like the total or an arbitrary allocation?

Q. Give us the total and give us the other one that it played with. A. Played with a picture entitled Out of the Blue on the Loew circuit and the film rental was $110,500.

Q. For one picture or— A. For the two pictures.

Q. For the two pictures?

Mr. Raftery: Have you those contracts? You had them here yesterday. T Men and Out of the Blue?

Mr. McGovern: Yes.

Q. They were purchased as a combination show by the Loew's circuit, Marcus Loew Booking Agency, for exhibition in all the theatres listed in this schedule, isn't that a fact? A. They were contracted to play those theatres, that is correct.

Q. And the terms under that contract—

The Court: By "that" you are referring to Plaintiff's Exhibit No. 3?

Mr. Raftery: I believe that is it. It has two marks on it.

307 Mr. McGovern: I think it is 7 now, your Honor.

The Court: Exhibit 7.

Q. Now, what was the next highest grosser you had that year? A. Next picture?

Q. Yes. A. Red Stallion.

Q. That was a first-run on Broadway at the Columbia Theatre, according to your exhibit, is that right? A. That is correct.

Q. You got a rental of $7,500 for that picture? A. Yes, sir.

Q. And that had a metropolitan run in either the RKO or the Loew circuit, did it not? A. I would have to check that.

Q. What do you mean, you have to check? A. I don't know off hand. It isn't indicated here.

The Court: You have something there you can check it from?

The Witness: I think it is in another pile of papers. I will look for it.

A. (Continuing) Red Stallion played the Loew
308 circuit, yes, sir.

Q. What was your film rental from the Loew circuit on that play? A. $17,700.

Q. As contrasted with $110,000 that you got on the T Men? A. On the T Men combination with Out of the Blue.

Q. Was the Red Stallion played with another Eagle Lion picture? A. Not that my—this record indicates.

Q. What is your third high grossing picture that year? A. The Noose Hangs High.

Q. Did that have a first-run in New York City? A. State Theatre.

Q. What film rental did you get from that? A. From the State Theatre?

Q. Yes. A. $3,200.

Q. Did that play either the Loew or the RKO circuit? A. It played the RKO circuit.

Q. What film rental did you get from the RKO
309 circuit? A. $22,500.

Q. How about Canyon City, did that have a first-run? That is your next high grossing picture for that year? A. That is $1,100,000. That played Criterion Theatre.

Q. What was the film rental of the Criterion? A. $11,800 —is that right? Canyon City, excuse me, $7,200.

Q. What was your New York Metro on that one? A. New York metropolitan, $133,900.

Q. Did that play the RKO circuit in combination with another picture called Raw Deal? A. That is correct.

Q. What film rental did you get from RKO on that com-

bination? A. That is, I think it wasn't sold as a combination but sold—

Q. Sold separately? A. Yes.

Q. But, I mean, two Eagle Lion pictures played on the same bill? A. Not exactly, no.

Q. I beg your pardon? A. I am trying to agree
310 with you; that a figure I gave you will be what we both understand it to be.

Q. Let us have it. A. While it was played with another of our pictures, they were sold separately. The rental on Canyon City was $76,700.

Q. It that for the first five days or your additional— A. I don't have that contract.

Q. That was a holdover? A. That was the rental that our record shows we received from RKO on the circuit, seventy-six seven.

Q. How about Raw Deal, what was the rental? A. Raw Deal, $11,300.

Q. That was a flat rental? A. I think it was, yes. It would be.

Q. Isn't it a fact, without taking you picture by picture, that every Eagle Lion picture released during this entire period, that had a first run in a representative first-class first-run theatre on Broadway, played either the Loew circuit or the RKO circuit? Isn't that a fact? A. Well, if we can agree on what you refer to as a first-run
311 theatre.

Q. What would you say are the first-class first-run theatres, or were?

The Court: Let us take one as your exhibit says, New York first-run. You define there what is a New York first-run in your exhibit.

The Witness: In the exhibits, sir, the theatres listed as the first exhibition in this midtown area, the theatre that the picture played at the first exhibition in the midtown area.

Q. Let us stop right there. Didn't you a little while ago

tell us the Gotham, the Rialto and the New Yorker were really second-class first-run theatres on Broadway? Didn't you so testify? A. Compared to the palaces on Broadway, these are.

Q. Those are the second-class ones? A. They are smaller, they are less attractive, yes.

Q. Would you accept as a fact that the first-class first-runs during this period that appear on your charge are the Criterion, the State, the Victoria, the Rivoli, the Globe? A. They are clearly first-run theatres.

Q. Wait a minute. I haven't finished. The Cap-
312 itol and the Mayfair? A. What about them?

Q. Will you agree with me that they are all first-class first-run theatres? A. I will agree with you on that, yes, sir.

Q. Will you also agree with me that every picture that had a first run in any one of those theatres were played across the board, as we say, in either the Loew or the RKO nieghborhood theatres? A. I don't know if every one. I would have to check that, but I am sure a substantial number of them—

The Court: Look at the exhibit.

The Witness: I cannot tell from the exhibit. I have to refer to other records.

Q. Have you got the records here? A. I have some other figures here.

Q. Look at them and see if that is not the fact. And forgive me, Mr. Gross, I left out the Astor in that list of first-class theatres. Will you agree on the Astor also? A. Yes, sir.

Q. Thank you. A. How would you classify—you weren't excluding the Bijou? I am not to count the Bijou?
313 Q. The Bijou, we will come to Red Shoes. A. We took our—

Q. We will come to Red Shoes later. A. I am to limit this examination to merely theatres you just mentioned?

Q. Yes.

The Court: Theatres that have been described as first-class first-run theatres.

The Witness: I have two pictures here, 49-50 season, and one played the Mayfair and one played the Globe, and I don't have any indication at that point whether they had played the circuit. I will give you the titles, if you like.

The Court: What are the titles?

The Witness: Guilty of Treason and Black Book.

Q. Black Book or Black Bart? A. Black Book.

The Court: Are those the only two?

The Witness: No, I have others.

The Court: Mr. Raftery, he has others. Go ahead.

The Witness: Trapped played the Globe.

The Court: Which one was that?

The Witness: Trapped, and I don't have any rec-
314 ord of it having played the circuit offhand in here.

Mr. Wright: I might say, your Honor, in the course of pretrial we broke these down for him in all sorts of schedules, first-run Broadway, and all those other things I will be glad to make him up any kind of schedule on this, if he tells us—

The Court: No, I think it is a general question and, I think, is important, which of the pictures were shown at first-run first-class theatres didn't show on either Loew's or RKO circuit.

Mr. Wright: I think it is a little unfair to the witness to expect him while on the witness stand to do the necessary research.

The Court: If it is going to take too long, let us drop it at this time.

Mr. Wright: If given time, of course, we can do it; give him anything he likes.

The Court: You are finished?

The Witness: I am trying to get his attention. I have some—

The Court: He has some more.

Q. Name them. A. You have Trapped—I want to stay

with your theatres—a picture called Zomba played the Gotham.

315 Q. Gotham is in the second-class. A. Oh, that wasn't included?

Q. No. A. Rialto is second-class, too?

Mr. Raftery: I am looking for his folder here.

The Court: You had better listen to the answer.

(Record read.)

Mr. Raftery: Right, yes.

The Court: You agree that the Rialto is a second-class first-run theatre?

The Witness: Yes, I would agree, a second-class theatre.

Mr. Raftery: They tore—

The Court: Depends on how long ago it was.

Mr. Raftery: Judge, that theatre was torn down and they rebuilt a business building and a small theatre on that site.

Now I have that summary referred to as the breakdown.

The Court: Have you finished your answer to that question?

The Witness: I think so, yes, sir.

Mr. Raftery: All right.

315a The Court: You may ask him the next question.

By Mr. Raftery:

Q. Now, the picture Trapped, that you referred to, played the Globe theatre, isn't that a fact? A. Is that what I said, the Globe?

Q. Yes. A. All right, yes, sir.

316 Q. And the national gross on Trap was what? A. $314,000.

Q. Right. And your first-run film rental of the Globe was how much? A. $2,200.

Q. Let us take a picture like the Jackie Robinson Story. Where did that picture have its first run in New York city? A. At the Astor Theatre.

Q. And what was the national gross of that picture? A. $663,000.

Q. And what was your film rental at the Astor theatre? A. We got no film rental from the Astor Theatre.

Q. Isn't it a fact that the RKO circuit took that picture, played it over the circuit and brought you in a tremendous amount of film rental even though you got no first-run film rental at the Astor? A. I will give you the exact figure if I can.

Q. Good. A. The RKO, my figures indicate, paid $28,500 for the Jackie Robinson Story.

Q. For first neighborhood run? A. That's
317 correct.

Q. And that is all you got? A. It played another one of our pictures.

Q. What was the other picture? A. The Story of GI Joe, as I see it here.

Q. And it played as a combination show? A. Yes.

Q. How much did you allocate to GI Joe? A. I am not clear. Was this a combination contract for the two pictures? I have it broken down here.

Q. What is the breakdown? A. $12,200 I have alongside of the picture GI Joe.

Q. And GI Joe was a reissue, wasn't that a fact? A. That is correct.

Q. And Jackie Robinson was a new, fresh picture and RKO played it on Labor Day just before the World Series, isn't that a fact? A. I don't have the play date here?

Q. You haven't got the play date? A. No. But $28,500.

Q. Now let us take the pictures that had a first run in the theatres that we have agreed upon are first-class
318 first-run theatres on Broadway, and what is the total number of pictures that appear on this list, and I will let you check it over tonight to make sure it is correct. How many pictures had a first run in a first-class theatre on Broadway?

The Court: You mean of the pictures listed on Plaintiffs' Exhibit 11?

Q. Out of the whole 196, how many? You have got a copy. A. Yes, sir.

Q. How many are there? A. This schedule covers the theatres the Criterion, State, Rivoli, Victoria, Globe, Capitol, Mayfair and Astor, and there are 24 pictures on this schedule.

Q. And those are the 24 pictures that had a first run in a first-class theatre on Broadway, isn't that a fact, of the 196? A. These are the pictures that played first run at these theatres and which we both agree were first-class theatres.

Q. Right. Now, what was the national gross of those 24 pictures? A. $14,912,200.

Q. What was the first-run film rentals in New York
319 City? A. The total?

Q. Yes. A. $225,700.

Q. And what was the New York exchange gross on those? A. $1,928,800.

Q. Now, taking this metropolitan area as defined in your complaint, how much money did Eagle Lion collect out of the metropolitan area on this group of pictures? A. $1,497,500.

Q. Now will you give us the different ratios? A. That you worked out?

Q. That are worked out at the bottom of this schedule and which— A. This is your schedule.

Q. I appreciate it, but you were given it and you check it and it is accurate, is it not? A. It says what it says it says.

The Court: You checked it?

The Witness: Yes. All these computations are accurate. The addition in this particular schedule is so.

320 By Mr. Raftery:

Q. Give us the ratios if they are accurate.

The Court: What computation do you want?

Q. The first ratio of the New York exchange to the national. A. 12.934 per cent.

Q. What is the New York metropolitan to national, No. 3? A. The ratio?

Q. Yes. A. 10.042 per cent.

Q. So at least on the pictures that had a first run in the Broadway area in these so-called first-class theatres, the New York metropolitan to national instead of being 6.4, as it is on the 196, is 10.042; isn't that correct? A. Well, 6.4 is New York without the first run. You didn't ask for that one.

Q. Wasn't that figure computed on the same basis as you computed it? A. I tried to point out that the New York metro minus the first run is the ratio of 6.4.

Q. What is the No. 4? Is that computed on the same basis as your 6.4.? A. You have New York metro
321 here less rental, and then you divide it—no, it is not exactly the same ratio, Mr. Raftery. You used as the basis of the ratio the total national and 6.4 of ours excluded the New York metropolitan less New York first run.

Q. I can't follow you on that. A. This was your schedule, Mr. Raftery. I am trying to help you.

Q. We will come back to that, don't worry.

By the Court:

Q. What you are saying is that in computing your 6.4 on Plaintiffs' Exhibit 10 you excluded from the New York metropolitan the rental paid for first run? A. Yes.

Q. They included that in the national? A. Yes.

Q. You say on this latest ratio you referred to that was not done? A. That's right.

The Court: Maybe overnight Mr. Raftery had better do a little computing of the ratio in that way and see how that comes out and submit it before we start tomorrow

morning to this witness and see if he agrees with
322 your mathematics.

Mr. Raftery: I will have a good mathematician do it.

By Mr. Raftery:

Q. Let us go to your art pictures, the first page of that schedule that has to do with the art theatres, so called. Can we agree that during this period the Sutton, the Paris, the Embassy 46th Street, the Little Carnegie and the Translux 60th Street were generally known as art theatres? A. Well, they played art pictures.

Q. But they were known in the trade as art theatres, were they not? A. Yes, that is fair enough.

Q. A number of your pictures played in those particular theatres, isn't that a fact? A. Yes.

The Court: Where is your booker for an art picture? Who handles that? That is what I would like to know.

Mr. Raftery: You would be surprised.

The Court: I probably would be. Are they booked through one of the major distributors?

323 Mr. Raftery: No. Neither Loew nor RKO were in the art theatre business at this period. These theatres were operated seperately and differently by different interests.

For instance, the Translux 60th Street, which has now been torn up and they are putting a building up there, that was operated for years by the Translux Company, of which Mr. Brandt of the Brandt circuit was the man. Likewise the Sutton Theatre has been operated by another interest, the Paris by another interest, and you sell them the same as you would anybody else if you were fortunate.

The Court: All right. What is it that makes a theatre an art theatre as distinguished from an unart theatre?

Mr. Raftery: They are generally small capacity, they are intimate, some of them serve coffee, they don't sell popcorn; they cater to that pocketbook that is willing

to pay a little bit more than to go to a conventional, regular type theatre.

The Court: In other words, they assume that the average audience is not necessarily all adolescent?

Mr. Raftery: The best answer was given in this court by a gentleman by the name of Weinstock. He
324 said, "I cater to the carriage trade."

Does your Honor wish to continue?

The Court: Yes.

By Mr. Raftery:

Q. How many of these 196 pictures were exhibited in the so-called art theatres? A. Your list here has 22, a conspicuous exception being a picture called Red Shoes.

The Court: Does that agree with your understanding? You are doing the testifying and that chart given you by Mr. Raftery is merely to refresh your recollection. Does it agree with your understanding?

The Witness: There is one prominent picture that isn't on here that played in art.

Q. We will come to the prominent picture right now and we will leave this. A. I just wanted to understand what we were talking about.

Q. You released a picture called Red Shoes? A. That is correct.

Q. That featured a dancer named Moirer Shearer; is that right?

The Court: A ballet dancer.

325 A. Yes.

Q. And that picture played the Bijou Theatre in New York City as a road show, isn't that a fact? A. Yes.

The Court: What is a road show?

By Mr. Raftery:

Q. Tell us what a road show is? A. A road show, as I understand it, is an exhibition of the picture for generally an extended period of time at selected theatres throughout the country.

Q. Let us confine it to the Bijou. You showed that picture on weekdays twice, once at a matinee and once at night, isn't that right? A. I am not clear about that.

Q. And you charged theatre admissions and reserved all the seats just as you would for a legitimate show, isn't that a fact? A. I didn't see it at the Bijou.

Q. You wanted to talk about Red Shoes. A. I said you left Red Shoes off this list, and that is all I have to say about it.

The Court: Is that what makes it a road show, when they charge theatre prices and reserved seats?

326 Mr. Raftery: Yes.

Q. And it had a special advertising and special exploitation; is that a fact? A. As I recall, it did, yes, sir.

Q. And it ran at that Bijou Theatre for the better part of two years from the time it opened, isn't that a fact? A. It ran a very extended period of time.

Q. While it was playing at the Bijou Theatre it played in no other theatre in the metropolitan area; is that a fact? A. That is correct.

Q. Then after it finished its run at the Bijou Theatre you put it into general release, isn't that a fact? A. About two years after the original release at the Bijou.

Q. Two years after showing at the Bijou as a road show, you licensed the Victoria Theatre on Broadway the right to show it first run, New York; is that a fact? A. Yes, sir.

Q. It had a conventional first run in a first-run

327 Broadway theatre; is that right A. Yes.

Q. And then it went to the neighborhoods? A. Yes, sir.

Q. And RKO played it across the board in every one of its theatres? A. It played on the circuit, yes.

Q. And paid you a very substantial film rental? A. Do you want to know exactly how much?

Q. I would be delighted. A. It paid you $62,500.

Q. In film rental? A. In film rental.

The Court: It has now approached 4:30. If we have come to the end of Red Shoes—

Mr. Raftery: Red Shoes can turn blue now, your Honor.

The Court: We will adjourn until 10:30 tomorrow morning. Tomorrow afternoon we are going to adjourn at 4:15 because I understand there is a judges' meeting called for that time.

Monday being a legal holiday there will be no session.

Mr. McGovern: You invited us yesterday to address a memorandum to you as to whether the findings
327a and conclusions in the Paramount case were admissible. We have prepared a memorandum on that.

The Court: Give one to your opponent, if you have an extra one, so they can answer it.

(Whereupon, an adjournment was taken until February 10, 1956, at 10:30 a.m.)

328 **Norman Gross, resumed.**

Cross Examination continued by Mr. Raftery:

Q. Have you got there those Loew answers to the interrogatories? A. No, I don't have them. The ones that were offered yesterday?

Mr. Raftery: I am going to another matter, your Honor, solely to finish my inaccurate compilations of yesterday.

The Court: All right.

Q. Mr. Gross, I believe Mr. McGovern stated here on the opening of the trial that the cutoff date under an amended complaint—

Mr. Raftery: Was what date, Mr. McGovern?

Mr. McGovern: April 28, 1951.

Mr. Raftery: April 28, 1951?

Mr. McGovern: Right.

329 Mr. Raftery: And the original complaint was October, 1950?

Mr. McGovern: The original date of the complaint.

By Mr. Raftery:

Q. These figures which you compiled and on which you based all your comparisons were up to and including April, 1951; is that correct? A. No, that is not correct.

Q. What was the last date of your figures? A. Of any particular group; Eagle Lion, perhaps?

Q. Take the exhibit— A. The key?

Q. No. Take the exhibit where you listed the grosses of all your pictures. I think it is Exhibit No. 9. A. They varied for the different companies.

Q. I am taking the Eagle Lion figures. A. I asked you.

Q. Eagle Lion, that's all. A. February 24, 1951.

Q. Now, Eagle Lion Classics started operating when? A. To my own knowledge, I think that is when they took
330 over Film Classics pictures in June of 1950.

Q. Mr. MacMillen testified it was June, 1950. A. That is my understanding.

Q. So any figures in your grosses on Eagle Lion pictures from June, 1950, to February, 1951, were Eagle Lion Classics figures, isn't that correct? A. Well they were pictures being distributed by Eagle Lion Classics, if that is what you mean.

Q. Yes. And those figures from the June date to the February date were all Eagle Lion Classics figures; that is, money that came into Eagle Lion Classics isn't that correct? A. I am not sure that I understand. As differentiated from Eagle Lion?

Q. As differentiated from the Old Eagle Lion company that turned over its assets, or what ever it turned over, to Eagle Lion Classics in June of 1950. A. They are Eagle Lion Classics figures, yes.

Q. From that date on? A. Yes. That was a new company, then.

Q. Yes. And Eagle Lion Classics is no longer in this lawsuit, isn't that a fact? A. I don't understand the legal—

Q. Isn't it a fact—

331 Mr. Raftery: Can I get a concession from counsel that on the same day, or about the same day, that the eight were let out, Eagle Lion Classics as a plaintiff dismissed as to all the defendants, including the Loew defendant and the RKO defendant and the case was dismissed as to that party on that date?

The Court: Is that correct, Mr. Wright?

Mr. Wright: My understanding was that the cause of action here was transferred to Chesapeake at the time of the sale and I believe then Eagle Lion Classics was dismissed as a plaintiff, but Eagle Lion Classics' cause of action is in the plaintiff Chesapeake Industries.

Mr. Raftery: Well, that we dispute.

By Mr. Raftery:

Q. But, at any rate, Eagle Lion Classics, from June of 1950 to February of 1951, the period, those figures that you have included in these lists as Eagle Lion grosses include all those figures? A. That's correct.

Q. Now, Mr. MacMillen also testified that the grosses—

Mr. Raftery: Your Honor, might I read into the record—it is very short—the order dismissing as to Eagle

332 Lion Classics, Inc?

Under date of May 3, 1954, the following order was entered in this court signed by Hon. Augustus N. Hand. I will merely quote the order without the title:

"Upon motion of plaintiff, Eagle Lion Classics, Inc., for leave to discontinue this action with prejudice,

"It is ordered, that the complaint of Eagle Lion Classics, Inc. against the defendants and each of them be, and the same hereby is dismissed, with prejudice."

Entered May 3rd.

The Court: Let me ask Mr. Wright: How does the claim of Eagle Lion Classics go over, then, to Chesapeake?

Mr. Wright: It was assigned to Chesapeake prior to the sale of Eagle Lion Classics to United Artists. That sale occurred in March, 1951. Just before the sale was made, this

cause of action was assigned by Eagle Lion Classics to the parent company, Chesapeake, along with these other assets that Mr. MacMillen described. Before the sale was made,

333 there were a number of assets and liabilities that were retained by the parent, Chesapeake, in that form. They were assigned from Eagle Lion Classics to Chesapeake. And then Eagle Lion Classics was sold to United Artists with the remaining assets.

So that I suppose it is clear that Eagle Lion Classics never had a cause of action against these plaintiffs after March, 1951, when the assignment and sale occurred.

The Court: Let me ask you this: Was the complaint amended? Did the complaint allege a claim on behalf of Chesapeake Industries growing out of that assignment of the claim from Eagle Lion Classics?

Mr. Wright: Yes. There was a supplemental complaint filed, I believe, shortly after the sale. I think it was filed at the pretrial conference which alleged the sale of the Eagle Lion Classics as of that date and also alleged the prior assignment from Eagle Lion Classics of its cause of action to the plaintiff Chesapeake. That was the supplemental complaint which I think was filed at the time of the pretrial conference.

The Court: I have a copy of that supplemental complaint here which says that on April 11, 1951, the plaintiff, Pathe Industries, whose name was later changed to Chesa-

333a peake Industries, made an agreement pursuant to which the cause of action of the plaintiff, Eagle Lion Classics, was assigned to plaintiff, Pathe Industries, Inc., which is now Chesapeake Industries.

Doesn't that mean, Mr. Raftery, that that supplemental complaint preserved the cause of action of Eagle Lion Classics and alleges it was assigned to the plaintiff, Chesapeake Industries?

334 Mr. Raftery: That would be true except for the fact Eagle Lion Classics comes in here and dismisses with prejudice its cause of action.

The Court: When was that dismissal? That was in 1954?

Mr. Raftery: Three years after the alleged assignment.

The Court: Yes, but previous to that assignment, according to this supplemental complaint, it had assigned its cause of action to Chesapeake Industries, and the complaint was amended by the supplement to so allege. At that time, therefore, in 1954, Eagle Lion Classics had no cause of action; it had assigned it to another plaintiff.

Mr. Raftery: That is possible.

The Court: And, therefore, it was dismissed from the action, but does not that mean that Chesapeake Industries alleges that it has a cause of action in Eagle Lion Classics as stated in the original complaint? Isn't that the net effect of that?

Mr. Raftery: Yes, but there has been no proof from them of that fact.

The Court: Yes, but that is what the cause of
335 action which is alleged is, is it not?

Mr. Raftery: Yes.

Mr. Wright: I am a little surprised to hear them mention no proof when in supplemental answers he actually alleged the assignment himself, filed before that order was entered.

The Court: We can go ahead.

Mr. Raftery: We can go ahead. I am just making my proof of the dismissal, that is all.

Mr. McGovern: Do you want to look at the answer you filed?

Mr. Raftery: No. What I want now is that exhibit you put in, where you acquired from Mr. Rank's company the right to distribute pictures in this country.

By Mr. Raftery:

Q. Now, of these 196 pictures that are included in your tabulation, most of those pictures, or a great many of those pictures were produced by outside producers and, as Mr. MacMillen testified, Eagle Lion distributed them and received a commission— A. That is right.

Q. (Continuing) —for doing it? A. That is right.

336 Q. For example, with all the so-called British pictures, the General Film or Rank pictures? A. That is right.

Q. Do you recall what commission you received on those pictures? A. On the Rank pictures?

Q. Yes. Perhaps I can save a little time by looking at Exhibit No. 3. Isn't it a fact you received a sum equal to 35 per cent of the gross until the gross reached $750,000, 30 per cent of the next $250,000, and 25 per cent of the amount by which the gross exceeded $1,000,000? A. That is what it says here, Mr. Raftery. I don't know that to be the fact.

The Court: That is in Exhibit 3. That is what the contract provides.

Mr. Raftery: Yes.

Q. That applies to each picture? It does not mean the gross of all the aggregate pictures, but the gross of each picture? A. I don't know what that means. I have never seen that.

The Court: The document speaks for itself.

Mr. Raftery: It speaks for itself.

337 Q. At any rate, in computing your figures and making these charts, all your calculations have been on the basis that all money that comes in was Eagle Lion money, isn't that a fact? A. No, but the charts reflect only what they reflect, that they are rentals, a hundred percent rentals.

Q. And they are gross figures? A. They are gross rental figures, yes.

Q. I don't mean by gross, I don't mean your figures, but they are gross figures? A. That is correct, yes, sir.

Q. You have made no allowance of any kind or character of what had to be paid out by Eagle Lion to each respective producer of each respective picture? A. Not on those charts.

Q. Not on those charts. So, by no stretch of the imagin-

ation, could you work out a chart by which you would show the net—

Mr. Raftery: I withdraw that.

Q. Could you work out a chart where you would show the net amount that would be due and really be the Eagle Lion money as distinguished from the producer money?

338 A. Yes, sir.

Could be worked out? A. Yes.

Q. And it would reduce these top figures that you have for each picture by the amount you were obligated to pay to each producer? A. It wouldn't reduce the chart. The chart is rentals.

Q. I am talking of figures. It would reduce those figures? A. If I were to take the distribution percentage of the rental?

Q. Yes. A. Then the percentage, being less than 100, it would reduce the figures, as I understand it, yes.

Q. And substantially reduce them? A. Yes.

Q. I think Mr. MacMillen testified you only got a commission of 25 per cent on Peter Rathvon pictures? Did you hear him? You were in court? A. If he said it, that is the fact.

Q. So in that instance of the Rathvon pictures you would reduce your figures from 100 per cent down to 25

339 per cent? A. I wouldn't reduce the rental.

Q. I am not talking rental. I am talking what Eagle Lion hoped to get out of these pictures. A. Oh, yes, clearly that is the case.

Q. On those Metro pictures, you read us a little of the answers to interrogatories. Have you the answers there which show, first, the three pictures selected for the 1946-47 season? A. From the interrogatories, do you want me—

Q. From the answers. A. Yes, yes. '7?

Q. Yes. A. '46-7.

Q. What is the top picture selected? A. The Hucksters.

Q. What was the median picture selected? A. Love Laughs at Andy Hardy.

Q. What is the low picture? Not the Loew Company, I mean, but what was the low grossing picture? A. Boom Town.

Q That was a reissue? A. Yes, reprint.

Q. Reprint, they call it.

What is the national gross on the top picture there,
340 The Hucksters? A. On The Hucksters?

Q. Yes. A. The answer to the interrogatory gives the gross for the United States and Canada.

Q. That is all I want. What was it? A. $3,635,296.

Q. What was the median grossing picture which— A. Love Laughs at Andy Hardy? $1,656,753 for United States and Canada.

Q. What was the Boom Town reprint gross for the same period—I mean, same area? A. I cannot for the moment find it. Do you want to give me a little more time? There were several sets of answers that came.

Mr. Wright: You have that on a schedule that you gave Mr. Raftery at the pretrial deposition, haven't you? Those figures on those pictures?

Mr. Gillespie: National gross, you are looking for?

The Witness: I am looking for the answer Loew gave and they gave me a figure for United States and Canada.

Mr. Raftery: I am examining from what is in evidence, Mr. Wright, trying to stick to that.

The Witness: There was, as I recall now, a picture
340a substituted and we may have gotten it by letter. I am trying to find it for you.

The Court: Do you know the answer, Mr. Raftery?

341 Mr. Raftery: I am not certain. I think Boom Town is—what is that figure, $740,000?

The Court: The gross on Boom Town, the reissue, was $740,200.

A. That figure is not the figure in the answer, though.

Q. That is why I asked you. A. That is why I am trying to find the answers.

The Court: All right, you find the answers.

The Witness: It may be in the correspondence file.

The Court: Is that the lowest of the pictures?

Mr. Raftery: That is the lowest one that year.

The Witness: That picture was substituted for another picture and——

Q. We will come back to that. Let's see if we can't hurry that a little. A. I am doing the best I can.

Q. Let's take the next year. I believe Cass Timberlane was the top picture. A. What do you want to know?

342 Q. What was the national gross on that? A. $3,955,024.

Q. Have you got the first-run New York film rental in that same space there or near it? A. No. New York metropolitan on Cass Timberlane?

Q. First metropolitan, what was that?

The Court: First-run metropolitan, you mean?

A. New York metropolitan is what you are asking?

Q. How much was that? A. The New York metropolitan area as defined, Cass Timberlane, $424,889.

Q. What was the New York first-run film rental? A. That is on another page.

Q. All right. Have you got it handy? A. The first-run film rental, $100,381.88.

Mr. Raftery: Now, your Honor, I think I can save some time. These figures, Mr. Gillespie advises, were prepared by Mr. Gross, furnished to us. I can read in the 12 of them and he can correct any of them he wants if there are any corrections to be made.

The Court: If you want to read them in ——

Mr. Wright: It is agreeable. We gave him all these figures on the schedule in 1953.

343 The Court: Then they can be read into the record, and, if on checking the record, you find anything you want to correct it can be corrected later.

Mr. Raftery: We have covered The Hucksters on the national gross. The New York exchange was $469,000 ——

The Court: Is it just one sheet of paper?

Mr. Raftery: No. It has RKO, Columbia, a whole lot of other information.

New York exchange for $469,000; New York first run, $81,000; New York metro, which is what I referred to as the gross area, $325,900.

Love Laughs At Andy Hardy, $1,565,700; $178,000, New York exchange; no New York first-run film rental; New York metro, $127,400.

Boom Town, a reissue, the gross is $749,200, national; New York exchange, $51,000; New York first run, $51,000; New York metro, $40,600.

Cass Timberlane, we have the figures on that. He read them all.

Desire Me, the median picture, $1,370,200; New York exchange, $280,800; first run, $11,700; New York metro, $215,500.

344 Tenth Avenue Angel, $679,800; New York exchange, $58,700; New York metro, $39,900; no first-run film rental.

The next year, Words and Music, $322,000—no, $3,220,700; New York exchange, $608,900; first-run film rental, $176,800; New York metro, $482,000.

Hills of Home, the median picture, $1,305,900; New York exchange, $106,500; first-run, $10,900; New York metro, $65,000.

Night at the Opera, a reissue, $545,000; New York exchange, $56,000; New York first run, $25,300; New York metro, $41,800.

On the Town—this is 1949-50, the last season—$2,704,700; New York exchange, $535,400; New York first run, $235,500; and New York metro, $457,300.

Doctor and the Girl, a median picture, $553,000 national gross; New York exchange, $123,000; New York first run, $3,200; New York metro, $82,500.

Tension, national, $457,500; New York exchange, $47,900; New York first run, $600; and New York metro, $33,800.

By Mr. Raftery:

Q. These, Mr. Gross, are the 12 pictures that you
345 were comparing your 196 with; is that right, in that comparison? A. These were the low pictures.

Q. That is all I am talking about, the Loew pictures only. A. That is correct.

Q. Now to get back to yesterday: we have added a fifth line to this document which you have a copy of.

The Court: Which document is that?

Mr. Raftery: It is not marked as an exhibit. It is a copy of comparisons that have been made here.

The Court: All right.

Q. And we call the fifth line "Mr. Gross' method of calculation. Now, these are the ——

Mr. Wright: Excuse me just a minute. I would like to see which one of these schedules of yours you are talking about.

(Mr. Raftery shows document to Mr. Wright.)

Q. These are the pictures that we identified yesterday as the pictures that had a first run in either one of these theatres which we both agreed were first-class, first-run theatres. A. Yes, sir.

Q. Now, using the method that you used to ar-
346 rive at the 6.4 and applying it only to these pictures, isn't it a fact that on these pictures the ratio comes out 9.32 instead of 6.4, just on these pictures? A. Well, in the first instance, the picture T Men, as I wrote to you in 1953 or 1954, the New York metropolitan figure was changed and actually you have to make that correction on this chart and you get a different figure here.

Q. You get a higher figure, though? A. No, the New York metropolitan was lowered for T Men and you get a lower figure here than you have.

Q. Well, as a statistician how much lower than 9.3 would it be? You had a $30,000 difference, as I recall it,

in the New York exchange. A. We have about $49,000—$39,000, excuse me.

Q. $39,000? A. Yes.

Q. That would reduce 9.3 to what figure? A. To exactly 9.0.

Q. Then we can agree that on the pictures that are listed here that had a first run in this group of theatres which we have agreed are the first-class,
347 first-run Broadway houses, 9 per cent was the ratio figure and not 6.4? A. On those pictures?

Q. On those pictures. A. Yes, that is exactly right.

Q. Now, let us look at your art pictures—pardon me. I withdraw art pictures.

Let us look at the pictures that played in what we agreed were art theatres and use the Mr. Gross method of calculation, and what is the ratio figure on those pictures? A. You have 14.3.

Q. What have you got? A. 14.3.

Q. Then we agree on that one. We agreed yesterday these were second-class, first-run theatres, the Gotham, the New York and the Rialto. A great many of your pictures played a first-run in those theatres at varying rentals from zero up to $3,200, I think was the top.

Now, using your method of calculation, what is the ratio figure instead of 6.4? A. Well, in the first instance, I would like to point out that there is an
348 error in the figures of one of the columns.

Q. In one of the columns? A. Yes.

Q. Is it bigger? A. It is $5,000.

Q. Which column? A. In the column "Rental New York First Run."

Q. That error in no way affects the calculation on your method except to reduce — — A. To the extend that it changes it, it changes it.

Q. It changes the gross amounts. Having picked out the error, which is the figure you come to as the proper

ratio figure on the group of pictures that played in these second-class theatres? A. I have 3.5.

Q. That I will accept. I had 3.55, caused by the error. Now, some pictures played in the Palace Theatre, all flat rentals and with a vaudeville show.

Have you calculated what the ratio on that is instead of 6.4? A. 4.1.

of 6.4? A. 4.1.

349 Q. 4.1. I will accept it. I have 4.7—4.07. A. If it were corrected, it would be 4.1. If you corrected it, wanted to make it two figures, it would be 4.1.

Q. What about the next group, the reissues? They had no first run in New York City. How did you figure those out? A. I grouped all those that had no first run together. I didn't make the calculation on the reissues alone.

Q. Did you make the calculation on all the pictures that had no first run? A. Yes.

Q. What does that come out to? A. On my basis?

Q. Yes. A. 5.9.

Q. We had a lot of talk about Red Shoes yesterday. Red Shoes, we agreed, was first road shown at the Bijou Theatre; is that correct? A. That is right, in New York.

Q. In New York. And later it was released and played first run at the Victoria? A. That is correct.

350 Q. And its national gross was $1,985,700?A. On the road show.

Q. On the road show? A. Yes.

Q. What was its national gross on the non-road show? A. $1,196,600.

Q. And what was the New York metro on the non-road show? A. $149,700.

Q. And have you there the amount of money—I think you gave it to us yesterday, but I am not certain—that you collected from the RKO neighborhood theatres on the showing of Red Shoes on the non-road show? A. I don't have it in this statement. I will find it.

Q. Let us skip it and we will go to something else.

Of this million nine —— A. May I point out—you asked me to give you a figure, the pictures that did not have a first run, and in your schedules you had a picture repeated twice, GI Joe. You first had it listed as
351 not having played a first run, and then you picked it up again in another schedule as having played a first run, which it actually did.

Q. We listed GI Joe —— A. Twice.

Q. We listed it as having a first run at the Palace Theatre; is that a fact? A. That's right. In the earlier sheet you have GI Joe listed under a heading "Eagle Lion Reissues that Had No First Run in New York City." and you have GI Joe there as well.

Q. That would make a $2,500 difference, if I remember correctly, right, or something like that? A. Well, whatever difference it is.

The Court: Did it change those ratios anything perceptibly?

The Witness: No, not materially.

Q. It doesn't change them at all? A. It changes them as much as it changes them. That is all I can say as a mathematician.

Q. You have figured it out and what are your classifications—we will take, first, the pictures that had a first run in a first-class theatre. What is the ratio figure
352 on those? A. Your classification?

Q. Yes. A. These are your schedules, sir; right?

Q. Yes. A. All right.

Q. Will you put down on paper here the percentages. The first one is the pictures playing in the first-class, first-run theatres. What is your ratio figure computed in the Gross method? A. 9.0.

Q. What is it on the art pictures? A. On the art pictures?

Q. I mean the art theatres. A. 14.3. Do you want me to make a note of these as we go along?

Q. Yes, put them down. And what is it on the second-class theatres, the pictures that played second-class, first-run theatres? A. 3.5.

Q. What is it on the Palace, where it played with vaudeville? A. 4.1.

Q. And I see GI Joe here, there is a $2,000 flat
353 rental. And what is it on all the pictures now that never had a first run? What is the figure? A. I have 5.9. I have combined it. 5.9.

The Court: Mr. Raftery, you asked what the rental was on Red Shoes, and that was given to you yesterday, $62,500.

Mr. Raftery: Thank you very much.

By Mr. Raftery:

Q. Now, Mr. Gross, in your calculations here, what brought the average down to 6.4? A. Well, adding up all 196 pictures, the average was 6.4.

Q. And the average was brought down, was it not, by these pictures that never had a first run in a Broadway theatre or had a first run only in a second-class Broadway theatre, those were the pictures that brought your average down, were they not? A. When you talk about bringing the average down, Mr. Raftery, you are talking where the weight of the matter—of the figures lies. In other words, this is a ratio to national, and you must consider that the bigger nationals have the bigger weight.

On the pictures that had no first run, as you just
353a said, and those that had second-class theatres with first run, the combined national film rental there is close to $18,000,000. The pictures that played at the first-class theatres had a national film rental of $15,000,000. So you might say that they have equal weight in this resulting average.

354 Q. You had about 20 pictures that had a first run in first-class theatres? 24, I think —— A. 24.

Q. (Continuing) —— was the total. And the remain-

der of 170 pictures, approximately, 172—we will do a little better for you. You had some then that played in art theatres A. Yes.

Q. And about, we will say, 20 of those. Was it 20? A. 22.

Q. So 22 and 24 makes 46. 46 from 196 leaves you 150. 150 pictures that were all low-grossing pictures nationally, isn't that a fact? A. Would you tell me what low-grossing means, and I have them, some figures.

Q. We will say under the lowest figure you mentioned from Metro. A. What was the lowest figure we mentioned from Metro, do you recall?

Q. I think around close to four hundred.

Mr. Gillespie: $457.500.

Mr. Raftery: Right.

A. You would like to know how many of our pictures did what?

355 Q. All I say is the 150 pictures, every one of them, grossed less than the lowest Metro picture you used for comparison, isn't that a fact? A. 150 pictures of ours certainly grossed less than $500,000, that is correct.

Q. And a good many of them grossed less than $100,000? A. Yes, sir.

Q. A good many grossed less than two hundred? A. Yes.

Q. And a good many less than three hundred? A. Well, let me see.

Q. As a matter of fact, will you look through this exhibit of yours—have you got the original here? A. May I see it, please?

Q. Surely. Tell me the lowest grosser you had during that period. A. During the four years?

Q. Yes. A. I have one here for $2,800.

Q. That was from the whole United States? A. That is correct, as of that date.

Q. You have included that type of gross in with your

196 to arrive at these alleged comparisons? A. Yes. I left no pictures out.

356 Q. Isn't it a fact that in the 1949-50 season you had 19 pictures that grossed less than $50,000 over the whole United States? A. That is correct.

Q. Did you have similar situations in each of the other other seasons? A. We can count them.

Q. All right, let us do it quickly. And in the season immediately preceding you had 19 that grossed less than $50,000 in the whole United States? A. That is correct.

Q. That was 19, the other one 19—that is 36 pictures out of 196 that grossed less than $50,000.

Let us go to the next year. You had 6 that grossed less than 15? A. That is correct.

The Court: What season was that?

Mr. Raftery: That is 47-48.

The Witness: That is right.

Q. And in the first season, 46-7, you had eight that grossed less than $50,000 in the whole United States? A. That is correct.

Q. In that year your biggest grosser was $369,-
357 000, the reissue? A. That is correct.

Q. The next year the biggest grosser was T man, that we discussed yesterday. Next year your road show was your biggest grosser on Red Shoes, but let us take regular release, Tulsa. That was the biggest grosser the next year? You grossed a million, six, a hundred and twenty odd, right? A. Yes.

Q. Out of the New York metropolitan you got $95,500 on Tulsa? A. Yes, sir.

Q. And you got $4,500 first-run? A. That is correct.

Q. At the Capitol Theatre? A. Capitol, that is right.

Q. Your next year your biggest grosser was the general release of Red Shoes, right? I didn't think there were—there were three and this is the fourth. A. You may be right.

Q. This was released later in the season, but even

though it was released later, it was your biggest grosser? A. In that season, yes.

Q. In that season. And on general release and
358 nationally did $1,196,000? A. That is correct.

Q. Destination Moon was your second biggest grosser and that hadn't had a road show ahead of it? A. No, sir.

Q. That did $1,116,000 nationally and you got $144,700, over 10 per cent of your national gross, out of the New York metro, isn't that a fact? A. That is correct.

Q. And you got some first-run film rental on that picture in New York? A. $62,900.

Q. $62,900, and RKO played that across the board, isn't that a fact? A. RKO played the picture, yes.

Q. You didn't, at any time, have any pictures that were comparable to those Metro pictures that you used for comparison, except possibly Red Shoes, isn't that a fact? I am talking of the top ones. A. You mean comparable in national gross?

Q. Yes. A. We didn't have pictures of high national grossers Metro.

Mr. Raftery: That is all for me.

359 The Court: I want to ask the witness a couple of questions to clarify something in my mind.

By the Court:

Q. When you talk about this 6.4 ratio, that is the ratio of subsequent-run rental from New York to the national film rental less such subsequent film rentals, is it not? A. That is correct.

Q. Therefore, am I right—maybe I asked this question once before—am I right in saying, if the ratio is 6.4 that the national ratio would be the difference between that and the 100? A. You mean if we used the national rather than that?

Q. Rather than the—— A. Actually, if we used the total national, including that, the figure would be higher—

excuse me—the figure would be lower, because I have as a denominator there—the comparison would be a large figure and the ratio would then be lower.

Q. This is the ratio for all Eagle Lion products? A. 6.4, yes, sir.

Q. 6.4. It is the ration of the New York revenue as against the national revenue, isn't that it? A. As against everything in national except that.

360 Q. All right, yes. A. Yes.

Q. If you make the comparable ratio for pictures which have had a first run in New York, let us say 9 or 10 per cent, whatever that worked out, would that mean that the national revenue would have been proportionately reduced? In other words, the ratio between New York and national would mean that New York would have gotten a larger proportion of the national, is that right? A. On those pictures that we showed here this morning, that played the first-class house in New York, their percentage, if you take this out alone, is higher.

Q. That would mean, then, that you conclude that where a picture had a first run in New York, it got on the first-run neighborhood theatres? A. Doesn't necessarily follow that you have that first run in New York you got.

Q. But those pictures you talked about, that had first runs, I think you said nearly all of them that had a first run in New York, had a first run—— A. Yes, practically. There were one or two exceptions.

Q. One or two, but practically all of them did. Does that mean that they produced more revenue
361 proportionately in New York than they did in the rest of the country? A. No; that means that those pictures received proportionately more in New York than some other pictures that didn't play first run, and didn't play a circuit.

Q. I realize that, but now I am comparing the ratio of revenue received by those pictures in New York com-

pared to the ratio received in the rest of the nation. If you increase the ratio that it got in New York, doesn't it mean that it reduces the ratio which it received in the rest of the nation? A. In so far as it is 100 per cent, it would be so.

Q. Does that mean, therefore, that those pictures in New York, which had a first run in New York, got a better run in the neighborhood theatres in New York than they did in the rest of the nation? A. No; no, that doesn't mean that, sir.

Q. But proportionately doesn't that necessarily follow? A. You mean—no, you cannot compare New York and then say what it is to the rest of the nation.

Q. Then that is what I don't understand about your ratio. If, instead of using ratio you used
362 percentage, it would make it a lot easier for me to understand, but how can you raise one ratio and not reduce the other ratio? A. If I understand you correctly, sir, you say that if you played in New York on a first-class theatre, first run, then you played on the circuits in those theatres that follow, you would get a larger amount of rental in New York than you would have gotten if you didn't have that first run and didn't get on the circuit and playhouses that followed.

Q. That I assume is what comes from your previous testimony. A. Precisely.

Q. What I am trying to find out is what that means so far as the rest of the country is concerned. Does it mean that in the rest of the country that ratio of the rest of the nation would be reduced in comparison to New York? A. Oh, I see. You want to turn it upside down.

Q. Turn it upside down. A. You want to say if you have a fixed figure for the rest of the country and you take New York and you want to say how many times is the rest of the country New York, then you might come out ten times. If you want to—and then, if you
363 increase the New York and leave the rest of the

country the same, then, of course, the ratio would be different, it would be lower.

Q. If this ratio was a percentage, which I take it from what you previously testified it was not, then it would mean that of all your pictures this 6.4 per cent of the revenue would have been from the New York subsequent run and the balance of the revenue would have been from the rest of the nation, isn't that right? A. That is roughly it. Accurately, there is a correction, 6 per cent instead of 6.4, if you take—include it back in.

Q. If you raised that 6.4 to 10 per cent, which I think you did on one of those figures, then that would mean the 10 per cent of the revenue would come from New York and 90 per cent from the rest of the country, wouldn't it? A. Yes, on those particular pictures.

Q. Yes, those pictures. That would indicate then to me that of that type of picture in New York you were getting a larger proportion of the revenue than you were in the rest of the country on those particular pictures. In other words, that New York preferred pictures that had had a first run and paid more for them here,
364 whereas the rest of the country didn't care so much about them, isn't that what necessarily follows?

A. No, I don't follow you all the way with that. What you are saying is that those pictures that were successful in New York had a larger percentage on their national from New York.

Q. That is right. A. You are also saying that those pictures that were not as successful in New York, using the term loosely, successful, that they would have a smaller percentage on their national out of New York.

Q. That is right. A. That is all it means.

The Court: I just wanted to clarify it a little in my own thinking about those ratios.

Mr. Gillespie?

Mr. Gillespie: I have just one or two questions.

The Court: We will take a five-minute recess.

(Short recess.)

365 Mr. Wright: If the Court please, I spoke to Mr. Gillespie at the recess about these seven witnesses we have waiting here, and he very kindly agreed that we could withdraw Mr. Gross at this time and put on the other people.

The Court: Certainly, by all means.

Mr. Wright: Mr. Friedberg.

Saul Friedberg,

called as a witness by plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Wright:

Q. Where do you live? A. In Woodmere, New York.

Q. And what is your occupation? A. I am an attorney.

Q. Employed by whom? A. Universal Pictures Company, Inc.

Q. I show you these interrogatory answers of Universal that have been marked for identification here as Plaintiff's Exhibit 18, and I will ask you to look at those and tell me if those were the answers that were submitted by Universal when it was a defendant in this case in response to the interrogatories that were submitted by the plaintiff?

366 I think you will notice the last document there is a letter from you making some addition or change. A. Well, the papers which you have given me, which are labeled "Answers to Interrogatories," appear to be copies of the original answers that I prepared and the letters, certainly the signature on one of them is mine, the signature on the other appears to be my name written by somebody in my office and I wouldn't deny that any of this stuff was prepared by me and sent out by me.

Q. Well, to the best of your knowledge, what you have there are the answers that Universal supplied; is that correct? A. Well, I have the original here. These look

to be true copies of answers which Universal supplied, yes.

Mr. Wright: We offer that in evidence.

By the Court:

Q. Are the answers true and correct to the questions that were asked on the interrogatories? A. The best I can say to that, your Honor, is what I said in the verification. What they asked for was the collection of
367 a vast amount of data and I called for that data from the persons in the employ of Universal that I thought would have that material, and, to the best of my knowledge and information, they gave me correct answers, but what the books show, I don't know.

Mr. G. Raftery: Your Honor, may I be heard

The Court: You may cross examine.

Mr. G. Raftery: Just primarily as to these answers.

The Court: Do you want to cross examine him?

Mr. G. Raftery: As to anything that is in them, we have never at any time questioned that it came from the records or anything in that respect, as we have previously outlined to you. Our basic objection here is that these people are not defendants in the case. Whatever answers they made are not binding on us and, as I understood it yesterday, whatever proof that is going to be offered—to save bringing attorneys like Mr. Friedberg and the other attorneys that are here—we never raised any question as to the authenticity of the figures that may be in these documents.

368 The Court: Let me pose this question. Do you accept these figures given in these documents with the same force and effect as if witnesses were called to testify that those are true and accurate statements from the books of these companies?

Mr. Raftery: Only as to the figures. Your Honor, we have been trying to short-cut this because half of the New York bar is unemployed today.

The Court: They are unemployed very profitably.

Mr. Raftery: They could be employed more profitably elsewhere. I am wondering about this, to save time. The thing that we wish to preserve for ourselves is that it is no proof of any kind or comparability in character or quality as to the limited number of pictures that had been compared as between Universal or Paramount or any of these other ex defendants.

The Court: That, of course, is something that you can always argue.

Mr. Raftery: I am wondering this, whether we can enter into some sort of stipulation with our friends that the pictures named and the grosses set opposite are
369 true and correct names of the pictures and amounts of the grosses and names of the New York metro or whatever actual figures are in there, reserving to Mr. Gillespie and our side the right to move to strike the exhibits later in the case unless comparability in quality is shown.

The Court: Who is to show it?

Mr. Raftery: They are. It is their burden.

The Court: I said yesterday that answers to interrogatories given by somebody who is no longer a defendant in a case were not admissible as such because they would be hearsay; that if the plaintiffs wished to establish the truth of those answers they would have to call a witness wo could then testify about the facts set forth in there and that this witness would be subject to cross examination, which is what you do in a case where you want to avoid hearsay testimony.

Now, they have produced witnesses here, apparently, who say that these figures are figures that come from the books of account of these various companies. What I am asking is this: Will you concede that if a witness competent to testify from these companies was
370 called, he would testify that the figures shown on

these statements are the true figures from the books of account of the company?

Of course, you would have the right to cross examine any such witness at any time, but in order to save time, do you want to accept these statements as thought a witness came and testified to them?

Mr. Raftery: Yes. But I go one step further on this situation. I am not casting any reflections on Mr. Friedberg, but I don't think Mr. Friedberg is the type of witness that we could cross examine on the only point we want to cross examine.

The Court: That, of course, is up to you. Whether you want to accept this without such a witness is up to you.

Mr. Gillespie: I think I have a solution to this problem if you give us a two-minute recess so I can speak to Mr. Raftery.

The Court: All right.

(Mr. Gillespie and Mr. Raftery confer.)

Mr. Raftery: You have offered them in evidence, Mr. Wright?

Mr. Wright: Yes.

Mr. Raftery: That is, have you offered all the interrogatories or only the figures?

371 Mr. Wright: We offered them once and we offer them again. So far as I am concerned, the figures are what they consist of.

The Court: You are offering this document which has been identified by Mr. Friedberg concerning which he has testified. I will reserve decision on your offer and I will allow defense counsel to cross examine if they wish.

Do you wish to cross examine Mr. Friedberg?

Mr. Raftery: I have no cross examination of Mr. Friedberg.

The Court: Do you have any cross examination, Mr. Gillespie?

Mr. Gillespie: No.

The Court: Have you any objection to receiving the document in evidence?

Mr. Raftery: We object to it as incompetent, irrelevant and immaterial.

Mr. Gillespie: We have the same objection, your Honor, on the ground that there is no showing in those figures as to the quality of the pictures. They are just figures from the books of these corporations.

The Court: I presume if they called the general
372 accounting officer of any company and asked him what the figures were which were shown as to certain pictures, he could testify and it would be competent proof.

The extent of its relevancy is a matter of determination by cross examination and argument and other evidence, but it seems to me it is competent if you take these figures with the same force and effect as if they were testified to by a man who had personal knowledge of them. I will therefore receive them in evidence for such as they are worth.

Mr. Raftery: We will stipulate, that having been done, that if Mr. Wright were to call Mr. Kallman, one of Paramount's attorneys; Mr. Young, one of the attorneys for Twentieth Century-Fox; Mr Kaufman, one of the attorneys for United Artists; Mr. Riese, one of the attorneys for Columbia; Mr. Witty, one of the attorneys for Warner Bros. ——

Mr. Witty: I am not an attorney.

Mr. Raftery: —— from the firm of Warner Bros., that they would testify substantially the same as Mr. Friedberg, and we want the same objection and the same ruling, I presume, your Honor.

The Court: Well, on that basis I will admit these documents in evidence.

373 Mr. Raftery: I forgot one. I am accused of dis-

crimination. I forgot Mr. Howell of RKO—of Donovan, Leisure, attorneys for RKO Pictures.

Mr. Wright: I wanted to read the numbers in the record.

The Court: I take it all these attorneys can go back and engage in something more profitable than listening to this case.

(Plaintiffs' Exhibits 14, 15, 16, 17, 18, 19 and 20 for identification received in evidence).

Mr. Young: Your Honor, I am Young. I represent Twentieth Century-Fox. I heard Mr. Raftery's remarks, but our position is that this contains confidential information. Twentieth Century-Fox is not a part to this litigation and we feel that while we have no objection to the stipulation going into evidence, it should be treated as confidential and for the purposes of this case only.

The Court: So far as Twentieth Century-Fox is concerned, then, you had better come up here and take Mr. Friedberg's place on the stand. You are subpoenaed.

Mr. Friedberg, you are excused.

(Witness excused.)

374 The Court: Come up here and sit as a witness.

Mr. Young: I have ——

The Court: You have been subpoenaed. I want to get your testimony.

Charles F. Young,

called as a witness by plaintiffs, being first duly sworn, testified as follows:

The Court: Mr. Wright, you had better examine this witness.

Direct Examination by Mr. Wright:

Q. What is your full name? A. Charles F. Young.

Q. And your address? A. Bayville, Long Island, New York.

Q. Your occupation? A. I am a lawyer.

Q. Employed by whom? A. I am a partner in Dwight, Royall, Harris, Koegel & Caskey.

Q. And your firm represents Twentieth Century-Fox Film Corporation, does it? A. That's right.

Q. I show you these answers to interrogatories
375 that have been marked or, I guess, received in evidence as Exhibit 19, ——

The Court: It hasn't been received yet.

Q. —— marked for identification as Exhibit 19 and ask you if you recognize those as the answers that were prepared on behalf of Twentieth Century-Fox in behalf of the interrogatories served on it by the plaintiffs in this suit when Fox was a defendant? A. Oh, yes, these are the same ones. It has our firm cover on it.

By the Court:

Q. Are they true and accurate answers to the interrogatories? A. As far as the records of the company show, sir.

Q. Did you serve those answers upon the plaintiffs in this case? A. Yes, sir.

Q. What is confidential about them? A. We are no longer in the case. That is the only position.

Q. You mean that the only testimony that a witness can give is if he is a party to a case? A. No.

376 Q. You are called here as a witness and you are asked to testify about matters of which you purport to have knowledge as a witness. Now, are you pleading attorney privilege or what is confidential about this? A. No, indeed, not at all sir.

Q. Then what is privileged about it? You have already given this information to the plaintiff. It is now a part of the court record that anybody can see. What is privileged about it? I just don't understand. A. Well, there is no privilege, of course.

Q. Then what is confidential about it? A. The busi-

ness records of the company will be spread over all these antitrust suits that are going on all over the country.

The Court: That goes on with all suits.

Mr. Gillespie: I assume we have our same objection.

The Court: Yes.

(Witness excused.)

Norman Gross

resumed.

Cross examination by Mr. Gillespie:

Q. Mr. Gross, would you please take a copy of this exhibit——

337 The Court: Is that a list of pictures?

Mr. Gillespie: Yes.

The Court: I have it marked as Plaintiffs' Exhibit 11.

Q. Do you have a copy of Plaintiffs' Exhibit 11 before you? A. Is that the list of Eagle Lion pictures?

Q. That is the list of Eagle Lion pictures, yes. A. Yes.

Q. Yesterday Mr. Raftery went through this list with you and I believe you identified the pictures for the 1946-47 season which were westerns on that list. Would you be good enough to turn to that group of pictures which were released in the season 1947-48, please, and identify for me those pictures which were westerns or just give me the total number. That is what I am seeking to obtain. A. The total number of westerns in the 1947-48 season?

Q. That's right. A. Eight.

Q. Could you do the same for me with regard to the 1948-49 season? A. Yes, sir. Four.

378 Q. And the 1949-50 season? A. I have three pictures marked as westerns, but I am not sure that they bear the same connotation in this sense: I think when you are referring to westerns you are referring to westerns of the program variety. I think you mean the series westerns.

Q. Sixty-minute pictures.

Mr. Wright: You had better name the particular pictures being talked about, if there is any doubt.

A. There are three pictures that are identified as westerns.

Q. Mr. Gross, did you, in preparation of your ratios here, prepare certain work sheets from the answers to interroggatories? A. Yes, sir.

Q. Do you have a copy of those work sheets? A. Yes,sir.

Q. The one specifically that I am looking for is similar to that (showing to witness). A. Yes, sir.

Q. Do you have those work sheets before you? A. Yes, sir.

Mr. Gillespie: This is the one that was produced
379 on the deposition and marked Defendants' Exhibit 12 for identification.

Mr. Wright: This one (indicating)?

Mr. Gillespie: Correct.

A. Is that the corrected version by virtue of my letter to Mr. Raftery?

Q. That is correct, I believe (showing to witness).

Mr. Gillespie: I wonder if we might have that marked for identification.

The Court: Surely.

Mr. Gillespie: Do you have a copy that can be marked? I have a lot of figures on mine. I will agree we will have a photostat made of it and return it.

Mr. Wright: We have photostats.

(Marked Defendants' Exhibit A for identification.)

Q. Does that include the underlying papers, Mr. Gross? A. No, that is the summary sheet.

Q. I wanted the underlying papers as well marked for identification.

Mr. Raftery: In the interest of keeping the exhibits
380 separate, would your Honor mark that Defendant Loew's Exhibit A for identification?

The Court: Yes.

(Remarked Defendant Loew Exhibit A for identification.)

A. Will I have it back to testify?

Q. You will get it right away. A. You want all of the papers that go under this?

Q. Exactly, the sheets that went under the summary sheet.

(Witness and Mr. Gillespie and Mr. Wright confer off the record.)

Mr. Gillespie: I would like to have these sheets included with the summary sheet under that exhibit number, three additional sheets.

(Documents attached to Defendant Loew Exhibit A for identification.)

Q. Are you organized, Mr. Gross? A. As well as I can be.

Q. Will you please refer to Defendant Loew's Exhibit A for identification and to that portion of the work sheet which pertains to Loew's. A. Are you talking about these schedules now?

Q. I am talking about the schedule attached that
381 we just had marked for identification. A. Loew, yes, sir.

Q. Now, in arriving at the ratio figures which you testified to yesterday in respect of Loew's, I believe it was 9.0,—— A. That's correct.

Q. —did you use the figures that are under this designation of "Loew" on Defendants' Exhibit A for identification? A. Yes, sir.

Q. Now ,would you please look at the picture Desire Me. Do you see that? A. Yes, I have it.

Q. It is the 1947-48 year? A. Yes, sir.

Q. Do you see the national gross is $1,370,200? A. That's correct.

Q. Will you please look a little further down that list and you see Hills of Home, $1,305,900? A. Yes, sir.

Q. In other words, only about $50,000 or $60,000 apart in national gross? A. $65,000, yes, sir.

Q. Will you now look across on those two pictures
382 at the New York metropolitan rentals reported there? A. Yes, sir.

Q. And will you note that there is a New York metropolitan rental of $215,500 on Desire Me? A. Yes, sir.

Q. And a New York methopolitan rental on Hills of Home of $65,000? A. Yes, sir.

Q. In other words, about three times as much on Desire Me as on Hills of Home? A. Yes, sir.

383 Q. Do you have anything in your figures——

The Court: Shows the lustful taste of the New York audience.

Mr. Gillespie: Your Honor, I am just about to bring that out. You have taken the words out of my witness' mouth.

Q. Do you happen to know who were the principal stars in those two attractions, Desire Me and Hills of Home? A. I don't recall ever having seen them, and I don't know.

Q. You wouldn't disagree that Greer Garson played in Desire Me, and that Lassie, a dog, played in Hills of Home? A. I don't know that to be the fact.

Q. But you wouldn't disagree with me? You will take my word for it? A. Yes, certainly, if you will tell me.

Q. Have you in these ratios that you have been presenting here, Eagle Lion on one side and up to this point you have just had Loew's in here, at 9.0, have you given any consideration or any weight as to whether one of these companies had more pictures of the Hills of Home
384 type or more pictures of the Desire Me type? A. In this figure 6.4——

Q. In this figure of 6.4 versus the figure of 9.0 for Loew's. A. The figure 6.4 represents the aggregate of the 196 pictures hat Eagle Lion released and the 9.0 is the aggregate

of the 12 pictures that I have as a sampling for Loew's.

Q. You haven't given any particular consideration to the quality——

Mr. Gillespie: Withdrawn.

Q. You haven't given any particular consideration to the type of film that might be involved in respect of either of the companies? A. As I pointed out, I don't even know I saw any of the pictures. I just have the title and the figure.

Q. I want to ask you whether this question was put to on the examination before trial and whether you gave this answer.

Mr. Gillespie: I am reading from page 196 of the examination before trial of Mr. Gross.

Q. (Continuing):

"Q. So these compilations that have been made by you have been made without regard to the quality of any
385 of the pictures included in the compilations, whether they belonged to defendants in this action or whether they belonged to Eagle Lion?

"A. That is right"?

A. Yes.

Q. Was that question asked you and did you give that answer? A. That is what the record shows, that's right.

Mr. Gillespie: That is all I have for this witness.

The Court: Any further cross-examination?

Mr. Raftery: We have some on this exhibit.

Mr. Wright: That is not in evidence.

The Court: It is not in evidence.

Mr. Raftery: No, I know that. The interrogatories are in evidence.

The Court: The interrogatories and answers are.

Mr. Raftery: That is right.

Further Cross-Examination by Mr. Raftery:

Q. These figures you have put down for RKO on your worksheet you took out of the interrogatories except that

there were pennies or odd dollars? A. Rounded them out.

386 Q. You rounded them out to zeros? A. That is right.

Q. Those are figures you used in your compilations? A. That is correct.

Q. The first picture I notice for RKO is the Farmer's Daughter for the '46—what was the national gross on that picture? A. $3,123,200.

Q. What was the New York exchange? A. $624,000.

Q. What was the first-run film rentals? A. $85,900.

Q. In other words, RKO Radio Pictures got more film rental out of one run in one Broadway theatre than Eagle Lion got on that great number of pictures that grossed less than $50,000 through the whole United States, isn't that a fact? A. Would you repeat the question please?

The Court: The reporter will read it.

(Question read.)

Q. (Contin ing) It is self-evident, isn't it? A. You have $85,000, and there were several pictures there that were close to fifty. They must add up to over eighty-five.

387 Q. Let us take it slowly. A. Yes, I would like to.

Q. The $85,900 was paid for one run in one theatre in New York City? A. That is correct.

Q. In other words, RKO Radio Pictures got more film rental for one of Farmer's Daughter in one theatre in New York City than you got on a great number of your pictures from the whole United States? A. If we are talking about pictures that you counted this morning, there were some 30 or 40 pictures—is that correct?

Q. Yes. A. I would suspect that that total of national film rental would be more that $85,000.

Q. I didn't ask you that. A. Yes you did, sir.

Q. I did not. A. For the whole United States, you said.

Q. On the whole United States of a great number of

pictures you didn't get $50,000 for the entire run of that picture.

The Court: That was admitted before, that in certain pictures he got less than $50,000.

A. One picture, you mean, yes, no question about
388 that.

Q. Woman on the Beach was an action picture, isn't that a fact? A. Yes, sir.

Q. That grossed $697,000? A. Nationally

Q. Let us look at Columbia. A. Yes, sir.

Q. What is the first picture for the first year at Columbia? A. Johnny O'Clock.

Q. What did that gross nationally? A. $1,512,700.

Q. What was its first-run New York film rental? A. $31,400.

Q. Columbia had a great many westerns, did it not? A. Columbia, as I recall it, had a full line at that time of program westerns.

Q. You were working for them. A. Yes, sir.

Q. And you were releasing in the New York area these Columbia westerns? A. Columbia was releasing the westerns, yes.

Q. Yes, your company, and you were the office
389 manager over at the branch? A. Yes, sir.

Q. You had the Charley Starrett westerns? A. Charley Starrett westerns, that is right.

Q. Did Columbia ever get a play of a Charley Starrett western in any of the so-called first neighborhood run theatres in the City of New York while you were there? A. I don't know whether they did or whether they didn't.

Q. Isn't it a fact they didn't? A. If the record shows, they didn't. I don't recall of my own knowledge and memory now whether they ever played in any RKO or little houses.

The Court: Or any first-run.

Q. Or any first-run house. A. First-run New York?

Q. First-run neighborhood. A. First-run neighborhood?

Q. First-run neighborhood. A. Not first-run New York? I just don't know.

Q. How about the action pictures Columbia had? A. What was that?

Q. I am asking you. A. What is an action picture, Mr. Raftery?

390 Q. All right, I won't argue with you. Let us look at Universal. For the first season, what is the first picture there? A. Buck Privates Come home.

Q. Who were the stars of that picture? A. Abbott and Costello, if I recall.

Q. That picture didn't even get a first-run in New York City, did it? A. No. It got a first-run but there was no film rental paid for the run.

Q. No film rental. Let us look at United Artists. Down about the middle there, Africa Screams, that was a top picture, was it not? A. It was, apparently, the top picture for that season.

Q. What did it gross? A. $1,337,700.

Q. What was its metropolitan? A. New York metropolitan. $38,400.

Q. Now, going back up to Universal—we will stay with United Artists. Take the median picture the year before Lured, what was the national gross on that? A. $794,700.

391 Q. What was its metro gross? A. $100,000.

Q. Now, even though Africa Screams grossed almost double nationally, not quite double—— A. Yes.

Q. (Continuing) —as Lured, Lured did over twice as much in the New York metro as Africa Screams, isn't that correct? Almost three times—well over twice, anyway.

Q. Well over twice? A. Yes.

Q. Do you know any reason for that? A. Maybe I do. May I look at some other figures?

The Court: Yes.

A. For Universal?

Q. That is United Artists. Well, the picture Lured played the Loew long-half split, got $47,000 for that—and what was the other picture?

Q. Africa Screams. A. Africa Screams? Africa Screams played the Loew long-half second feature and got $28,000.

Q. Isn't it a fact in Lured you had a cast, a
392 star cast, consisting of Lucille Ball, Charles Coburn and a number of other important players and was a typical big city picture while Africa Screams was a picture intended primarily for the outlying districts? A. I didn't see either one.

Q. Don't the figures indicate that? A. The figures indicate, sir, what they indicate, that it received $100,000 in the New York metropolitan, Lured; and the other picture that played the second half, received less in New York.

Mr. Raftery: No questions.

The Court: Any redirect?

Mr. Wright: Yes, because there was a great deal of direct that wasn't available because of the absence of the interrogatories.

The Court: You may proceed.

Redirect Examination by Mr. Wright:

Q. On this question of those pictures, Africa Screams and Lured, as I understand your testimony you say that Lured, which got $100,000 out of the New York metropolitan run, played—what was it you called it, top feature long-half? A. It played the Loew circuit long-half on a split billing basis and earned on the circuit $47,200.

393 Q. What do you mean by a long-half split billing date? A. As I think I explained it earlier, the circuits have this long-half of the week, which comprises five or six days, and they play a double feature, and the usual arrangement is with a top picture and a second picture, and the top picture will play on percentage and the second picture will play on a flat rental basis. There are exceptions to that where they have two pictures that they give

apparent equal weight to and they play them as a combination on percentage. This particular picture Lured apparently played with another picture, which I don't know offhand, on that big half of the week, as one of the top features of the long half.

Q. I take it, then, that your position on that long half, whether you are the top picture or the lower feature, has a great deal to do with the amount of film rental that comes out of the circuit, is that right? A. Ordinarily the second feature is a flat rental price. For the Loew's circuit they are approximately $17,000. And flats, you have no recourse to get any more than the seventeen. If you play
394 percentage and the picture does well, you may get up to a half million dollars, I would presume.

Q. This picture, Africa Screams, I take it, as I understood you, that was shown by the Loew circuit as a bottom attraction? A. Yes, played Loew's long-half as the second feature. In this instance they paid $28,900.

Q. The difference in revenue would, at least as far as a circuit is concerned and your records show—— A. That would be part of the difference.

Q. Let me finish the question. A. I am sorry.

Q. —normally what you would expect, isn't it, between a feature that gets in on the top attraction and one which plays the lower, as the lower feature in the circuit, is that right? A. You would expect that you would do more in New York rental on a picture that played top on a double bill than what was slotted in, second feature, yes.

Q. How much film rental you take out of these circuits, I take it, depends to some extent on—not just on whether you get in or not but the terms on which you get in,
395 is that right? A. It would depend on the terms, the playing time, many other factors.

Q. When I say terms, as to whether or not you are exhibited by the circuit as the first feature or the bottom

feature during the long-half of the week, is that right? A. That would determine the film rental, yes.

Q. You would normally get a great deal more money for a top half, if you had a spot on the top half of the circuit's bill, than if you had it on the lower half, isn't that so? A. Clearly, you would expect and did get, most instances if not all, more on the top than on the bottom.

Q. I suppose it is also true, is it not, that if you get on the long-half-bill you would probably take a higher film rental than if you were only in what they call the short-half of the week.

Mr. Raftery: I am going to object to the leading questions. It depends on what the picture did and depends on a lot of things that this witness has no knowledge of.

The Court: I will allow the witness to answer. Probably, as a general knowledge, I think the answer is
396 perfectly obvious. Some things there is no dispute about, Mr. Wright.

Mr. Wright: I would like to point out that this is not general knowledge. This is, of course, an examination of these rentals.

The Court: Naturally, all other things being equal if a film had played the long-half it would get more than a film which played the short-half. Don't need any testimony to emphasize that fact, I should think.

What is the relevancy of this question, however? We have that educational background. Now, what is the relevancy?

Mr. Wright: I thought there was a good deal of relevancy when Mr. Raftery undertook to, as I understood him—maybe I understood the purpose of his questions, but I thought that what he was attempting to show by the contrast he made between the picture Lured and African Queen was this——

Mr. Raftery: Not African Queen.

Mr. Wright: Africa Screams, that what he was implying was——

The Court: What you think he had in mind is not evidence.

397 The Court: What you think he had in mind is not evidence. I drew some conclusions from the witness' testimony, you can draw some, but let us get some evidence of facts.

Mr. Wright: I just wanted to be sure that the impression that I thought had been created was not created.

The Court: The question attracted this thought to my mind, that here are two pictures which differed greatly in the New York metropolitan area in the inverse proportion to which they varied nationally. I take it that the question and answer was designed to show that pictures may differ in the New York metropolitan area and not necessarily differ nationally, or may differ in reverse nationally.

Mr. Wright: That I don't think there is the slightest question about.

The Court: Then that point is agreed upon. Let us go on to something else.

By Mr. Wright:

Q. There was one other picture he mentioned, Buck Privates Come Home, some Universal picture that was in this tabulation. A. Yes, sir.

398 Q. And he brought out that there was no first-run film rental on that picture? A. It played New York first run but no rental was paid by the theatre to the distributor—Universal.

Q. That was a Universal picture? A. That's correct.

Q. Where did that play first run in New York? A. It played for, I think, three weeks at the Winter Garden Theatre.

Q. Is that on that list of theatres that Mr. Raftery supplied in his tabulation as first-class, first-run theatres? A. He didn't characterize that theatre in any way.

Q. It wasn't on that list? A. It wasn't on the list.

Q. And that is where the picture played first run but it paid no film rental; right? A. That's right.

Q. Then that picture, did it get into either of the circuits? A. Yes. It played the RKO circuit long half, top picture, and received $73,600.

399 Q. Do you know who was in that picture? A. Abbott and Costello, as I understand it.

Q. And then did Eagle Lion have an Abbott and Costello picture called The Noose Hangs High shortly after that? A. Yes, sir.

Q. And did that picture get a first run in New York? A. Yes, it played at the State Theatre.

Q. That was one of the theatres that Mr. Raftery listed as first-class, first-run theatres? A. Yes, sir.

Q. And there was a first-run film rental paid for that picture? A. $3,200.

Q. And did that picture also get a play in the circuits? A. Yes. It played the RKO circuit long half, second feature, and received a film rental of $22,500.

Q. And how does that compare with what that Abbott and Costello feature that played the long half in the RKO circuit got? A. The Universal picture that played the long half, top picture, got $73,600, and the Eagle Lion picture with the same cast, Abbott and Costello, that

400 played the long half, second feature, RKO circuit, was $22,500.

The Court: Have you the national grosses of those two pictures?

The Witness: Yes, sir.

The Court: How did they vary nationally?

The Witness: The Universal picture, Buck Privates Come Home, had a national gross of $1,519,000 and the Eagle Lion picture, the Noose Hangs High, had a national gross of $1,171,000.

By Mr. Wright:

Q. Now, was that difference in the rental that those two Abbott and Costello pictures took out of the circuit also

reflected in the rental it got from the rest of the metropolitan subsequent run? A. The rest of the metropolitan includes that figure——

Mr. Raftery: I object to the argument contained in the question.

The Court: Yes. The question is objectionable but I think the witness is answering it in an unobjectionable way.

Tell us what you were going to say.

A. Simply that the New York metropolitan in-
401 cludes the circuit figures and on Buck Privates Come Home, the picture that played the long half, top, for Universal, New York metropolitan, it was $135,600, and "Noose Hangs High, which played the RKO, second feature, had a New York metoropolitan rental of $46,000—$135,000 compared to $46,000.

Q. Do you know approximately what the ratios to national gross of those metropolitan rentals in those two pictures was? A. Yes. On Buck Privates Come Home, the Universal picture, the ratio of the New York metropolitan sub-run, New York minus first run, to the national is 8.9 for Universal, and the Eagle Lion picture, 3.7.

Q. That was a difference of 3.7 as against 8.9? A. Yes, sir.

Mr. Wright: I think that is all we have now.

The Court: Return at 2:00 o'clock.

(Recess taken to 2:00 p.m.)

402 **Norman Gross**

resumed.

Redirect Examination Continued By Mr. Wright:

Q. Mr. Gross, you were examined on these figures and data that you have been talking about here at a pretrial deposition taken on May 14, 1953, were you? A. Yes, sir.

Q. And at that time you made available to the defend-

ants all of the worksheets that were used in preparing these percentages? A. Yes, sir.

Q. You have a copy there of the letter that was subsequently written to Mr. Raftery by Mr. McGovern on May 4, 1953? A. I don't have a copy of that letter.

Mr. Wright: We would like to offer that letter at this point, if we may do it by reading from the file copy.

The Court: What is the point of the letter? Is that evidence or what is it?

Mr. Wright: Yes, I think it is evidence. This is the letter in which we submitted these figures and then pointed out what we were going to do with them and also said that if there was any question
403 about the samples, they were to please let us know.

The Court: That is not binding upon anybody. A letter from one counsel to another is not binding on the other. I take it that you advised him of these figures, what you were going to offer them for, so they could properly prepare, but this is no proof of anything.

Mr. Wright: I do think, your Honor, that this letter is binding, at least on Mr. Raftery's clients in this suit, yes.

The Court: Binding in what way?

Mr. Wright: Well, having been notified that this is what we were going to do and that in our judgment this was an adequate sample, for this purpose, and if he thought differently, to let us know I should suppose he was then under some duty at that time to so advise us.

The Court: No, no,

Mr. Wright: That he was going to take that position at the trial.

The Court: For an attorney to write a letter to the other attorney, saying this is my position, and then expecting that the other side will come back and tell him whether they agree or disagree with it, no, I mean, if you wanted to get an admission from him
404 there is a procedure under the Federal Rules for doing that, but you don't get it by writing a uni-

lateral letter to another attorney. No, I won't receive the letter in evidence.

I will receive any facts that you have but not correspondence between the attorneys which are open to all sorts of constructions.

Q. Well, at the time you made these computations you were examined, I think, in pretrial, and you also, did you not, then, in addition to these percentages that you have already testified to, and I believe you have told how you computed those, you supplied them with a figure which represented the additional gross film rental that you claimed Eagle Lion would have had out of the subsequent-run theatres if it had received the same treatment that the defendants' pictures had had.

Mr. Raftery: I object to that.

The Court: He may say whether he submitted a figure.

Mr. Raftery: Yes, to that I withdraw objection.

The Court: Did you submit such a figure?

The Witness: Yes, sir.

Q. And what was the amount of that figure?

405 The Court: Before you get to that, you had better lay a foundation for it. What is the basis upon which you arrived at that figure?

Mr. Wright: That is what I was going to ask.

By Mr. Wright:

Q. Just tell us——

The Court: Ask him. Lay a foundation. What is the basis upon which you arrived at that figure?

406 Q. Tell us what you did, Mr. Gross, to determine that figure. A. Well, taking the complete released pictures of Eagle Lion, 196 that we released in those four years, and the ratio that I arrived at of 6.4 per cent, and taking the 96 pictures from the eight other distributors and making the same computation for the ratio and getting this 8.9 per cent and making the assumption of the difference that I would need, I determined the difference in

rental that would have been gotten in the New York subsequent run area, what amount that was to bring our percentage from 6.4 to 8.9, which was the aggregate percentage on the 96 pictures. And the difference in the two percentages is 2.5.

The Court: Let me ask you this: What you are saying in effect is this, that if the Eagle Lion pictures had received the same rental——

The Witness: The same ratio.

The Court: —the same ratio of film rental in the greater New York first neighborhood run theatres that they received——

The Witness: Not limited to greater New York—excuse me. Not limited to the first neighborhood run but to all of the theatres in this area.

407 What I am trying to determine is if I had as big a percentage as they did.

The Court: Percentage of the national?

The Witness: Percentage of the national. If our ratio were 8.9 how much additional New York revenue would I have needed to just simply get 8.9.

The Court: In other words, you are saying if Eagle Lion had done as well in New York in proportion to the national as the Loew's and RKO and the others did, you would have made more money?

The Witness: Yes. That is demonstrated. We had a lower percentage. If we had the same percentage to our own national as they had to their own national, then what does that mean in the film rental that is missing.

The Court: And you say that you would have gotten that if it had not been for this combination and conspiracy?

The Witness: I don't say. I say as a matter of mathematical computation this is the amount that Eagle Lion Pictures would have had to have in addition to what they got in New York in the subsequent run area to get the

same percentage as they got. It is simply that.

408 The difference is 2½ per cent and that is 2½ per cent of the national, less such subsequent run film rental, which is, in Eagle Lion's case $36,745,600. That is 2½ per cent of that, and that works out to $919,000.

Mr. Raftery: We object to him mentioning the figure.

The Court: I will allow that evidence. I will overrule your objection. I will take it for such that it is worth. That is a mathematical computation.

The Witness: Yes. That simply says if we had $919,000 more rental in this New York subsequent run area, then our percentage would have been the same. I would like to point out, your Honor, that this is the reason I used the ratio rather than the percentage.

You see, it is a ratio of this subsequent run to the rest of the country. I would get exactly the same figure if I used a percentage, but sitting here now and explaining how the $919,000 would come out, it is a little more complicated formula because I have to determine, then, the New York metropolitan plus "X" to a national figure now which

409 includes New York metropolitan and also have an "X" in it and you come out to the identical figure, but I thought it would be a little easier to explain at this point.

Mr. Gillespie: Your Honor, to preserve my position on the record, I would like to make the same objection on that point that Mr. Raftery did, and I assume you will make the same ruling.

The Court: I will take that as a mathematical computation of what would have happened.

Mr. Gillespie: Might I suggest, in lieu of my jumping up right behind Mr. Raftery or in front of him, that if Mr. Raftery does make an objection on behalf of his client it be deemed I likewise object unless I advise your Honor otherwise?

The Court: All right. I am always glad to hear from you.

By Mr. Wright:

Q. Let me see if I understand correctly. I want to be sure the record reflects correctly this last explanation that you made as to this figure computed either way.

As I understand it, you said that using this other method of figuring a percentage or ratio or whatever you call it, you would have had 6.0 for Eagle Lion and what was the
410 other figure, the corresponding figure, for the eight other distributors? A. Let me give you exactly the figure. If we had used the basis of the entire national, then we would have had 6.0 and the total ratio on the same basis for the others would be 8.2, and then I would have had to add the difference to both national and to New York metropolitan and estimated the damage figure is $919,000.

Mr. Raftery: I object to the estimated damage figure.

The Witness: The damage to the rental.

The Court: It isn't any proof of damages.

The Witness: It is just a mathematical computation that I estimate to be the difference in the rentals.

Q. The $919,000 figure on whichever percentages you used remains the same; is that right? A. Yes.

The Court: The witness has so said.

Now let me ask you this: That does not mean if you had the same results ratiowise that Eagle Lion would have made that $900,000-odd more?

The Witness: They would have had that much more rental.

411 The Court: But as I understand it from some answers you gave before, your only profit on that or the only thing you would have kept would have been your commission.

The Witness: Yes.

Mr. Wright: That is what I was going into next.

The Court: Go ahead.

By Mr. Wright:

Q. You also made an examination, did you, Mr. Gross, of the company's figures to determine with respect to these 196 Eagle Lion pictures that you used what part of the film rental that was received for those pictures remained with the plaintiffs in this suit; is that right? A. Yes, I did.

Q. Can you tell us what you found in that connection? A. Well, I analyzed the 196 pictures to determine, of all the rental they did receive actually in those years, how much they kept for their account on these particular pictures. They had distribution percentage on pictures that they were distributing for other producers, and
412 then we would only earn the distribution percentage.

We had pictures that we owned entirely, so that all of the rental would have been to the account of Eagle Lion or Classics, or whatever the other plaintiff is; and we had pictures where we got not only a distribution percentage but we had a profit participation and there were some profits.

So that I analyzed these total rentals that we received, some $39,000,000, and the analysis shows that Chesapeake would have retained for its account 45.4 per cent. They actually did retain $.....of that $39,107,000.

Q. That is the total amount of that retained by all the plaintiffs here, either as producer or distributor of the film; is that correct? A. That's correct.

Q. And, as I understand it, the distribution fee would vary from picture to picture, would it? A. It did vary from picture to picture.

Q. Can you just give us a notion of the extent of the variation?

The Court: Why bother with it? We know it varied.

Q. Now, you, as I understand it, had supplied
413 to the defendants, either in this pretrial deposition or later, your work sheets and your percentage

computations and this nine hundred—this total loss gross figure. I believe originally it was less——

The Court: What is the question? You have been making a long speech about what he did. What is the question?

Mr. Wright: The question that I wanted to ask him was, I want to define the extent to which this material had been submitted.

Q. You did submit, as I understand it, this figure of the lost gross rental but there was no pretrial submission of the computation as to the amount retained; is that right? A. That is correct.

Q. And you have your work sheets there for that? A. Yes, I do.

Q. To show how that was done.

Now, after these schedules of yours were submitted, as I understand your testimony on Mr. Raftery's cross examination, he submitted some to you; is that correct?

A. Yes, he did.

414 Q. Those you testified about and those schedules he submitted to you purported to show, did they, how the Eagle Lion pictures performed which played various kinds of theatres on first run and which played not on first run? A. Yes, sir.

Q. And in that connection I believe one of those categories he has on those schedules is one dealing with pictures that played which you and he agreed were second-class, first-run theatres A. Yes, sir.

Q. And is it not a fact that pictures of the other eight distributors also had first runs in the so-called second-class, first-run theatres here? A. Yes, sir.

Mr. Raftery: If the witness knows. I object to it unless——

The Court: Do you know?

The Witness: The answers to the interrogatories had

picture titles and the theatre at which they played first run, New York.

Mr. Raftery: Then I don't object to it.

By Mr. Wright:

Q. And did your interrogatory answers show
415 whether or not the films of these other eight distributors that played those second-class theatres on first run got into the circuit or did not, got into the RKO and Loew circuits or did not?

Mr. Raftery: Let us see the interrogatory, Mr. Wright.

The Court: He can answer that question and then we can find out specific answers.

A. Of the information that they supplied, the pictures that played what we agreed were second-class theatres, first run in New York for the eight defendants played on the circuit, they did. Not all, but most of those pictures that they made available to me.

Q. So that the mere fact—on those figures, the fact that a picture played first run in a second-class theatre was no bar to being played on the circuit?

Mr. Raftery: What is the question? I couldn't hear it.

By Mr. Wright:

Q. I said it is perfectly clear from the figures you have in the interrogatory answers that the fact that any picture had a first run in a second-class
415a theatre in New York did not in itself bar it from exhibition on the RKO or Loew's circuits?

Mr. Raftery: I object. It is argument.

416 The Court: I will allow the question about whether it barred or——

The Witness: I don't know whether or not——

The Court: (Continuing)—or whether as an historical fact they did play on the RKO.

The Witness: Precisely, that the figures that I have indicate that pictures of the other distributors did play,

what we agreed, the second-class theatres, did play on the circuit.

By Mr. Wright:

Q. It is also true, is it not, that pictures of these eight other distributors which got no first run in New York also played on those circuits? A. Yes. The interrogatory answers indicated that certain pictures had no first run and other answers indicated that they played on a circuit.

Q. These schedules that Mr. Raftery submitted for you—to you for checking were confined entirely to the Eagle Lion product, were they not? A. That is correct.

Q. Now, they were submitted to you with a letter, were they? A. Yes sir.

417 Q. Do you have that letter there? A. Yes, sir.

Mr. Wright: I would like to have that marked, and I wish to offer that letter in evidence.

The Court: Any objection to the letter?

Mr. Raftery: I don't know what it is.

The Court: Show him the letter.

(Mr. Wright hands paper to Mr. Raftery.)

Mr. Raftery: It doesn't add anything. I object to it.

Mr. Gillespie: I must object too, not binding on my client.

The Court: Let me look at it.

(Mr. Wright hands paper to the Court.)

The Court: What do you offer this to prove, Mr. Wright?

Mr. Wright: Well, I was going to follow that up with a question as to whether any of the promised schedules were ever submitted.

The Court: What difference does it make? That is not proof. You cannot prove, on trial, by correspondence between lawyers before trial. You are supposed to have your proof ready when you come in.

Mr. Wright: All I wanted to point out was that from that letter and what followed that it was
418 perfectly plain that in so far as the defendant thought there was any validity in the kind of breakdown that Mr. Gross was cross-examined about, they had plenty of opportunity to produce a schedule of comparable data, which is the only thing that would have made the breakdown meaningful at all, and they didn't do so.

The Court: How do you know? The trial isn't over. Mr. Wright, don't come into this court and try to try this case on the basis of correspondence between lawyers before the trial. All I am hearing is the evidence produced here. This letter from one lawyer to another about what he intends to offer is not evidence. Mark it for identification. I will refuse to receive it in evidence.

We have had a lot of talk here about a lot of different things, and I would like to get down to some facts and let us cut out all this talk about negotiations between lawyers before the trial. I cannot base a decision on that.

By Mr. Wright:

Q. Now, in so far as comparing the pictures by these categories, as I understand it, at the time the
419 sample pictures were selected there, there is no—or the interrogatory answers, as I understand it, don't purport to show the performance of the defendants' pictures in the subsequent-run theatres?

The Court: Objection sustained to a leading question, a question which is not intelligible on its face. Ask questions to get facts.

(Marked Plaintiffs' Exhibit 23 for identification.)

The Court: Not what you understand, Mr. Wright. Ask the witness a question.

Mr. Wright: All right.

The Court: Don't make a long statement as to what you understand and then ask a witness something.

Q. Do the interrogatory answers give you the data there as to the pictures of the other distributors which played in second-class theatres or did not have a first run, which would enable you to make a complete comparison of your data with theirs? A. On Mr. Raftery's basis, with regard to first run, the interrogatories supplied the first-run theatre for each of these 96 pictures, but they also supplied the metropolitan data, and using Mr. Raftery's characterization of theatres as first-class or second-class or art, I was
420 able to make a similar comparison for those 96 pictures, yes.

Q. The only comparison you could make, I take it, was then limited to such pictures in that sample as might have appeared as those shown in those houses or not shown? A. I have the complete data on those 96 pictures which enabled me to make the identical comparison Mr. Raftery made of our pictures.

Q. As to those pictures, is that right? A. Yes.

Q. And those pictures that played the second-class theatres, in so far as you have a sample, did you make such a comparison? A. Yes, I made a comparison on Mr. Raftery's basis, slightly different than mine, but just to match the figures he gave me at that time with the corresponding figures for the other distributors. With regard to the second-class theatres for, second-class, first-run theatres, for the other distributors, the percentage is 5.7, for the eight other distributors, and that compares with Mr. Raftery's analysis of our pictures for the second-class theatres of 3.4.

Mr. Raftery: How many pictures, so we can know what you are talking about?

421 The Court: You may ask that on cross-examination.

Mr. Raftery: All right, I will withhold that.

Q. There is only one more figure I think I am going to ask you about at this time. I neglected to have you make the computation by applying that 45 per cent retention figure that you got off the Eagle Lion pictures, as I understand it, to this $919,000 additional gross figure you previously described. What is the figure you come out with if you apply that percentage?

The Court: You mean your question is, if you take 45 per cent of the $900,000-odd what is the——

Mr. Wright: What is the answer.

The Court: Why not ask the question that way?

A. The answer is simply $417,000.

Mr. Wright: I will offer in evidence that chart, I think, that was marked for identification as Exhibit 10 for identification.

The Court: You offer that in evidence? Any objection?

422 Mr. Gillespie: Yes, your Honor. I object to the exhibit on at least two grounds. The first is that it covers a substantial number of theatres in this metropolitan area beyond those of Loew's and RKO; covers rentals received both as to Eagle Lion and as to the eight distributors from theatres other than those of the defendants here, and it is impossible to tell whether those ratios have been increased or decreased by monies from sources other than the defendants here; and on the second ground that it is based upon these pictures as to which there has been no showing of comparability.

Mr. Raftery: And on the further ground that no evidence has been offered by the plaintiff that at any time anybody ever tried to get the defendant theatres to play any more pictures than they did play.

The Court: I will receive it in evidence as showing the mathematical computation to which the witness has

testified. Its probative effect, of course, you may argue, but it will be received in evidence.

(Plaintiff's Exhibit 10 for identification received in evidence.)

The Court: Any further cross-examination?

Mr. Raftery: No further cross.

423 (Witness excused.)

The Court: Next witness.

Mr. McGovern: Your Honor, I wonder if we might have a brief adjournment in order to get the next witness in? He is waiting for a telephone call.

The Court: By all means. Ten minutes?

Mr. McGovern: Fifteen, could I have?

The Court: All right, fifteen minutes.

(Discussion in chambers.)

(Adjournment to February 14, 1956, at 10:30 o'clock a.m.)

* * * * * * *

424 The Court: Do you have some other witness now?

Mr. McGovern: Yes, your Honor. We would like to call John Peoples as our first witness this morning.

The Court: All right.

John Peoples,

called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. McGovern:

Q. Mr. Peoples, would you state your address for the record, please. A. My business address is 70 Pine Street, New York 5, New York.

Q. And what is your occupation? A. I am a
425 partner in Peat, Marwick, Mitchell & Co., certified public accountants.

Q. In that capacity, Mr. Peoples, have you over the past several years been responsible for the examination of the accounts and books of the Chesapeake Company and its subsidiaries? A. I have been the partner in charge of the examination since the first examination we made covering the year 1945.

Q. At my request, Mr. Peoples, have you made a summary of the operations of Chesapeake Industries, Inc. and its subsidiaries with particular reference to the operations of the motion picture subsidiaries? A. I have.

Mr. McGovern: Mark this, please.

(Marked Plaintiffs' Exhibit 24 for identification.)

Q. Mr. Peoples, I show you two statements which have been marked Plaintiffs' Exhibit 24 for identification, the top sheet of which is labeled "Chesapeake Industries, Inc. Distribution Income and Expenses, 1946-51, Inclusive," and the second sheet of which is entitled "Chesapeake Industries, Inc. Summary of Operating Results 1946-1951, Inclusive, by Class of Operation," and I ask you if this is the summary statement you have prepared? A. It is.

426

Q. Mr. Peoples, let me direct your attention to one or two items on this statement and ask you to explain for the record what those items represent.

At the bottom of the column under the 1951 on the first page there is an item styled "Loss Arising From Sale of Eagle Lion Classics, Inc.," showing a figure of $146,440.

Would you explain, please, what that item represents.

Mr. Raftery: Now, if your Honor please, we are going to object to this entire exhibit. It has absolutely nothing to do with the issue that is being tried here in this court. Whether Eagle Lion made money or lost money in its wordwide operation is certainly no evidence of anyting pertaining to the issues being tried here and we submit——of course, our friend has not offered it

in evidence yet, but he is seeking to inquire as to these various figures that have to do with the worldwide operation of the company called Chesapeake Industries, Inc. and in it somewhere buried I presume is something that has to do with the New York area, but we cer-
427 tainly are not here to fight an issue as to whether Eagle Lion or Chesapeake, whatever name it was operating under at that time, Pathe Industries, made money or lost money in their worldwide operation.

The Court: What do you say to that, Mr. McGovern?

Mr. McGovern: Your Honor, I suppose if it has no other relevancy at all, it is relevant in a case of this type just to depict the financial history of the plaintiffs, and I am sure if we did not put this kind of statement in Mr. Raftery would be the first to complain.

Over and beyond that, your Honor, it does undertake to summarize year by year through our public accountant what the actual operations of the motion picture subsidiaries were in terms primarily of their gross film rentals in terms of income, and, secondly, in terms of the expenses and the losses that those companies suffered during this period of time.

Finally, there is, as your Honor knows, a claim in this lawsuit for a loss of prospective profits and losses suffered as a result of being forced out of business.

The items to which I am now addressing Mr.
428 Peoples' attention goes to that latter point. But I say quite apart from anything else it does demonstrate the financial history of these plaintiffs and is, of course, relevant in a case such as we have before us.

The Court: Let me ask you, is this statement which is Plaintiffs' Exhibit 24 for identification a statement of the income and expenses of Chesapeake Industries and its subsidiaries in connection with motion pictures on a worldwide basis?

Mr. McGovern: It is on a worldwide basis. I think Mr. Peoples has with him a breakdown of our income,

that is, our motion picture income, as between domestic and foreign rentals in so far as that is material and your Honor wishes to inquire into it.

This is an effort to really break out on Chesapeake's consolidated annual statements such part of the operating picture as pertains particularly to the motion picture operations of Chesapeake.

429 The Court: Well, as far as I can see, taking a quick look at it, it looks as though there was a loss in each year from 1946 to 1951.

Mr. McGovern: That is right. You are talking about motion picture operations, your Honor?

The Court: Motion picture operations, leaving aside the question of surplus charges.

Mr. McGovern: That is right, except the second sheet shows, I take it, that for our total motion picture operations, production and distribution both, you have for the period set forth on that chart a total combined loss for those two categories of approximately $16,600.

You will recall that Mr. MacMillen estimated a total overall loss of $17,000,000. This exhibit and this witness are an attempt to actually button that estimate down in terms of the records of the company.

The Court: What relevancy does it have unless you can establish that this loss, or any substantial part of it, resulted from the situation in New York of which you are complaining?

Mr. McGovern: Your Honor, we point out that the
430 financial condition of the company over the years, is, of course, a material part of our case. We do contend, and we have claimed here, that the company was forced out of business particularly as a result of what happened to it in New York.

The Court: Let me ask you this: You have a loss here of almost $17,000,000, your motion picture business, worldwide. Now, what proof is there that any substantial part of that loss was occasioned by anything of

which you are complaining in the New York area? I don't quite understand the relevancy of worldwide losses to a particular loss which you say was occasioned in connection with the first-run neighborhood theatre in New York.

Mr. McGovern: We don't, of course, offer an exhibit such as this to prove that in fact we lost X amount of dollars in the New York area. We have other proof.

The Court: Isn't that the first thing you should establish?

Mr. McGovern: Well, I hope we have established it by now. At least we have proof put in the record which in our judgment goes to establishing the loss suffered in the New York area as a result of the operation of the two circuits here.

431 What we are saying is that that loss is, of course, a part of our total overall picture.

The Court: What do you say that loss was in the New York area in that period?

Mr. McGovern: The figure that Mr. Gross has supplied, I believe, is a figure of approximately $917,000 or $920,000—say approximately $920,000—gross rentals that we claim would have been derived in that area.

The Court: He said about 45 per cent of it would have been income that you would have received.

Mr. McGovern: Yes.

The Court: You take Mr. Gross' figures. Then you say that you lost in income in the New York area because of the matters of which you complain approximately $400,000.

Mr. McGovern: About that.

The Court: Of income, not all of which would have been net profit, I take it.

Mr. McGovern: That is right.

The Court: And now, what relevancy does the $400,000 loss of gross income to you have to a loss worldwide of $17,000,000?

432 Mr. McGovern: Your Honor, Mr. MacMillen testified, and I think these sheets tend to support the proposition, that the company started off and gradually expanded to a point where it was a first-class distribution organization throughout the country. We never, of course, and your Honor knows, contended that across the board our program or the quality of our pictures were always on the same level of theirs, but we have only related our damage to that claimed damage, to the claimed national grosses.

However, this chart does show we were a company that was doing a business or reached a point where we were doing a gross business in 1949 of about $17,000,000 a year. And a company doing that kind of gross business cannot be dismissed, in my judgment, as a comic or horse opera operation, as Mr. Raftery has been pleased to style it.

Mr. MacMillen testified after the merger with Classics in 1950, for a limited period thereafter, the company actually got in the black, and that by the time the Classics Films, had the additional product, began to run out towards the end of 1950 and the first part of 1951, we gradually came again to confront these continuing losses.

433 He further testified that it was the contemplation of those additional losses that decided him at that time to undertake to liquidate the company to sell the business and get out of the motion picture industry.

Now —

The Court: If you spread $400,000 of loss on rentals over the years it would be less than $100,000 in each year. As far as I can see, your loss in 1950, if I read this exhibit right, was over $2,700,000; your loss in 1951 was over $1,500,000.

Mr. McGovern: That is right. Of course, you will recall that we sold the company on April 28, 1951. There

was, really, a partial operation for ourselves in the motion picture industry during that period of time.

The Court: Then we go back to 1949. The loss was almost two and a half million dollars. Go back to 1948, is that right?

Mr. McGovern: Yes, if you go back to 1948, you will see, and this sheet showed, a total loss of something slightly in excess of $7,000,000.

The Court: Then what relevancy does a loss of $100,000, if that is a loss in the ——due to the facts al-
434 leged in this case have to do with these figures?

Mr. McGovern: I have to——

The Court: Isn't this put in merely to show that you were losing large sums of money which, apparently, from the proof had nothing whatever to do with this case at all??

Mr. McGovern: No, I think it does, of course, show we are losing large sums of money, there is no question about that, but I say, over and above that, it indicates the scope of the operation itself, so one cannot, whether you look at one sheet indicating loss or another figure showing profit, no one can style the operation as a horse and buggy operation, as it has been styled here by counsel for RKO.

The Court: I think the point that was made, whether right or wrong, was that the pictures that you had to exhibit were not as good as the industry required, and that that is the reason that you weren't making the income. Doesn't this exhibit possibly emphasize that argument of the defendants, that it wasn't merely in the New York area but throughout the entire world that you weren't making a profit?

Mr. McGovern: I think not, because I say that
435 Mr. Peoples can break out of our gross income, he can break out of it quite simply, the domestic from the foreign income, so that your Honor can have a clear picture of precisely how much of the $17,000,000 was

gross film rentals and in the United States, say, in particularly 1949.

The Court: Can he break out the income that was earned in the Greater New York area from the first-run neighborhood theatres?

Mr. McGovern: No, I don't think he can break that out.

The Court: Why can't that be broken out, I have been puzzling over this record over the weekend, and some of these exhibits, and it would seem to me it would be possible to establish, if you had an improper loss in Greater New York area from the first-run neighborhood theatres as you could from those theatres as compared to what you got from first-run neighborhood theatres in other parts of the country.

Mr. McGovern: If I understand your suggestion correctly, the first question you ask is whether we could break out what portion of our gross income was derived from the New York area,

The Court: That is right.

436 Mr. McGovern: Mr. Gross' figures establish that quite clearly, and I think——

The Court: That was from the first-run neighborhood theatres?

Mr. McGovern: Yes, he has broken that out too, and Mr. Gross has done that, I say.

The Court: Now, how does that compare with what you got from the first-run neighborhood theatres, comparable theatres, in the other part of the country?

Mr. McGovern: I don't think there will really be a serious dispute as to the fact that this New York situation, with these two circuits here controlling neigborhood run, is unique.

If there is any other place in the country where we have these circuits, such as here, I don't know where it is, and the defendants haven't suggested any such place.

I say that the only alternative we have is to compare a performance of our pictures in this area with the performance of their pictures in this area, and I know of no way it can be done except relating these performances with our national-wide film rentals, which is the best index of quality you have. It isn't a question
437 whether it played Broadway first-class or second-class house. The question is what it did actually take into the box office in terms of film rental.

We have given you a comparison in terms of commercial judgment, which is the only judgment we can make, since, of course, the aspect of circuits entered into this consideration, the only judgment we can make is the performance of our pictures in terms of the treatment they were confronted with here in these circuits with the performance of their pictures.

The Court: Let us make sure we are talking about apples and apples and not apples and oranges. That is the thing that bothers me about these figures. In the first place, is it conceded, as, apparently the defendants say it is in their brief, that you are not making any claim of discrimination of the first-run theatres in New York?

Mr. McGovern: Yes, we don't make any claim of discrimination. You are talking of first Broadway?

The Court: First Broadway run.

Mr. McGovern: That is right.

The Court: You claim that discrimination is purely limited to first-run neighborhood theatres in
438 New York?

Mr. McGovern: And the subsequent runs thereon.

The Court: And the subsequent runs as a result.

Mr. McGovern: Precisely.

The Court: Now then, is there any claim on your part that the so-called westerns should have played in the first-run neighborhood theatres?

Mr. McGovern: Well, your Honor, what the interrogatory data show is that we didn't make any claim that westerns should be played, particularly, when I say we make a claim, frankly, Red Shoes should have played, except that Red Shoes did play and, in fact, some westerns played.

439 On that we point out to you, and I think the interrogatory data presented in evidence will conclusively demonstrate this, that they played westerns on their own circuits, they played art pictures on their own circuits, and, indeed, what is an art picture when we come right down to it? Is a Red Shoes an art picture?

The Court: Let me ask you this. You got on this exhibit all the pictures that you produced, some which were described by the witness as westerns, with the indication that none of those had a first Broadway run; that they wouldn't get a first Broadway run.

Is it your contention they should have been shown in neighborhood theatres?

Mr. McGovern: Our contention is simply this. That they should have had the same kind of competitor access to those neighborhood theatres, the same kind of competitive treatment accorded to them that they accorded to their own pictures.

Mr. Gross testified, your Honor recalls, on the stand that any number of their pictures didn't have a first Broadway run, either, yet they played the circuits.

440 So what we are suggesting, Judge, it is impossible—there is just no rational basis for these alleged categories that Mr. Raftery has suggested in the form of which theatres they played, because they played on the circuit theatres which followed all these categories. They had pictures which did not appear on Broadway at all, they had picture that appeared in the Broadway so-called second-class house, and other pictures that appeared too. They played Red Shoes through the circuit.

So we have been unable to find any rational basis for comparing these pictures by categories.

We say we, overall gross, we didn't have the full line of product that they did. That is discounted by the fact that we have related our own situation in New York to our own national gross. We haven't sought to relate it to their national gross, although under the old Bigelow rule you could do so, you were entitled to take the performance of the defendant.

You see, it is in recognition of a fact it is an overall difference in all our consideration that we have limited our performance in New York to our own national
441 gross, and this, we suggest, makes it proper, due allowance for whatever difference in quality there may be.

But we say, your Honor, that nobody can now tell your Honor that this particular western wouldn't have played on a circuit then, if you have the monopolistic situation we describe. Who today can go back and say that?

All I can say is Red Shoes, which, I don't suppose, anyone would agree was an art picture, played the circuit.

The Court: Yes, but you are contending that pictures which had these low national grosses—some of which, like Cattle Woman, for example, had a national gross of $2,800, or Kangaroo Kid, that had a national gross of $7,400, or Perfect Woman, that had a national gross of $5,400, must be taken as comparable with other pictures of the defendant in getting this average that you want to get.

Is that what your contention is?

Mr. McGovern: Well, your Honor, as against the pictures you have mentioned, we can, of course, pick out any number of pictures of theirs from the interrogatories—the interrogatory data presented in evidence, which will get you that same sort of gross.

442 The Court: The same kind of national gross?

Mr. McGovern: Yes. You have a picture here called Destination Moon, distributed by RKO, that grossed $36,800.

The Court: Nationally?

Mr. McGovern: That is national gross, yes.

I am picking these out at random from the interrogatory data, a picture of Fox called Shark Island, which was a re-issue, and, as a re-issue, had a national gross of $38,300, yet they played the short half of the circuit. It didn't have Broadway first run.

Our contention, your Honor, is that if you are going to pick out pictures, we will pick out pictures. If they are going to talk about art, we will talk art.

All I am saying is when you get all through I think you are forced back to take the overall average as the fairest measure of what happened in the pictures in terms of their demonstrated appeal to the box office.

This is the only standard we have.

443 The Court: Would you say that the re-issue pictures which you had on this list also should be taken into consideration in determining whether you were kept out of first-run neighborhood theatres?

Mr. McGovern: Your Honor, I say certainly to the same extent that their own re-issues were. I just read off a re-issue here. Shark Island was a re-issue with $50,000 national gross. If their own re-issues are entitled to consideration on the circuit, then why aren't ours entitled to consideration?

I do not want to say any particular picture of ours would have played the circuit if not for the monopolistic control that we have demonstrated, because the truth is I don't know. I just say there is no other man alive today who knows either. I do not know whether Red Shoes would have played if it would have had competition in that time. I just don't know. All I know is they

did play Red Shoes although they tell you they never played an art picture.

It seems to me we have no test except the box office appeal. If they play re-issues of their own, I do not think they are in a position to say, "Take all your re-issues and throw them away."

444 If they play art pictures of their own, I do not think they are in a position to say, "Take your art pictures and throw them away."

No matter which category you touch upon, no matter how they spin these figures, you will find so far as the interrogatory material it demonstrates they have pictures in all these categories and they are playing them down the slot in the circuit. They are taking something out of New York; admittedly not much, but something.

All I am suggesting is I know of no way to really give you a comparable test except to take what happened to us here and look at our own national gross. Don't look at theirs. I am not asking you to compare our $58,000 with their Shark Island, but look at our national gross. I say if they can take out of the New York area $18,300 on a $58,000 national gross, that I do not think they can be heard to say that our $50,000 national gross should not take a nickel out of here.

The Court: Well, those are the best figures, then, you think you can develop on this as a basis of comparison?

Mr. McGovern: Yes. I say not only the best but the fairest picture.

445 The Court: When you come to this chart which you have now marked for identification, I am frank to confess I do not see very much relevance to this New York situation.

Mr. McGovern: I point out to you, sir, that we admit we lost money over the years. There is no question about that. We are not, of course, here seeking to recoup from these defendants any more than we can actually,

we think, button down in the record for you in terms of the interrogatory data.

I started out, I think, on the opening day by pointing out that of course you have in the Paramount case a finding of a nationwide conspiracy. We were, I think admittedly hurt across the country. It is quite clear that RKO here has circuits around the country elsewhere, but nothing that approximates the situation here. However, whatever damage was done to us there, as I suggested, is to their advantage in terms of the comparison we are trying to draw because we are using our own national grosses.

I think we presented, for that reason, a sort of minimum picture of our damage. We have taken our own national grosses, which were necessarily diminished
446 by the nationwide conspiracy in first-run, and we have related to that our performance in New York, so that we suggest, your Honor, that not only have we washed out, by using that approach, any differences in quality—we have discounted the quality question by taking our own national grosses—but we also suggest that by relating our New York performances to our own national gross we have taken a very diminished standard for the measurement of damages here.

Now I say we do not sue here, of course, for $16 million. I do think it is of considerable importance in the case to realize that over this period of time our gross rentals were growing consistently. We moved, your Honor will note, from $3 million in 1946 up to $17 million in 1949. I say this is at least picture of a company that is alive, it is vibrant, it is growing.

The Court: During that same period your losses were very large.

Mr. McGovern: That's right, but I say Mr. MacMillen has testified that with the merger with Classics we reached a point where, frankly, we thought he had our head above these red figures for a change, and

for a very limited period we actually got in the
447 black. Then when the Classics' product ran out,
we had nothing but this further prospect of additional losses, and he has testified it was that prospect that caused him to sell the company.

I say we have a specific claim in here, your Honor, and it has been here from the beginning of this case, that the sale to United Artists was forced upon us by the conditions we found in this New York market, and, consequently——

The Court: I do not know that there is any proof of that except Mr. MacMillen said it was so. To say that you are forced to sell out because you are losing, on your own figures, $100,000 a year in the New York market, when your actual losses ran, in 1948, to $7 million, in 1949 to $2.5 million, in 1950 to $2.7 million, it seems to me does not add up.

Mr. McGoevrn: I have pointed out, I think, earlier in the trial, your Honor, that there are really several impacts that these circuits and the monopolistic control that they exercised in this period of time forced upon independents like ourselves.

I pointed out to you in my opening statement, and I am sure Mr. MacMillen's testimony confirms this—your
Honor closed it off and said you understand that—
448 that one of the reasons why we found ourselves
in desperate straits was the fact that lack of access to this New York market precluded us from getting product from independent producers.

Mr. MacMillen testified as to the reaction of people like Rathvon, for example, a well known producer of considerable standing in the industry. Now, this, your Honor, is one of the intangibles in the case. If we had access to these circuits, it would be reflected to some extent, of course, by the gross rental we are seeking here. If we had access to these circuits in the last two

or three years, how many independent producers would we have gotten to give us their product for distribution? Well, we don't know this. Your guess would be as good as Mr. MacMillen's or anybody else's. I merely point out to you that each of these little segments of a company's business come to form an articulated web when you have the kind of business we were.

If we had access in New York, we would have additional income on the pictures we did distribute. This is one item of damage we are seeking here.

Secondly, if we had that additional income, of
449 course we would have additional independent producers who would be glad to have us distribute their product; and, thirdly, we would of course have been able to get ourselves a better break on the distribution fee itself. Instead of an independent producer coming to us and saying——

The Court: You have not proved that, that you could have gotten anything different. That is merely a hypothesis, that you could have gotten more. I notice from this exhibit that your big losses were in the production of pictures.

Mr. McGovern: That is right. We were, as you know, initially—those losses go down. We started out, as Mr. MacMillen's testimony shows, as a company undertaking to produce our own product, and the losses that we suffered there were very, very severe and we gradually then shifted over to the point where we tried to obtain the product of independent producers who themselves would assume the financial responsibility and burden of making the picture in the first instance and then turning it over to us for distribution. Those figures do reflect that situation as well.

The Court: I am not going to prevent you from putting in any proof that you may think is rele-
450 vant, because I am trying it without a jury. I will allow in any proof that you think is relevant,

but I have made these comments because I wanted to let you know that I cannot see what your losses on a world-wide basis have to do with this claim for damages that you have growing out of the New York area.

Now you may present the question to the witness.

By Mr. McGovern:

Q. Mr. Peoples, would you undertake to explain the figures shown in the lower righthand corner at the bottom of the years 1951 of $146,440? A. At the time Eagle Lion-Classics was sold, there was an actual profit on the disposition of the company, but that was more than offset by a provision that was required to be made for liquidation losses of closing up the different franchises.

The liquidation expenses was $483,000; the profit on the sale was $337,000. That nets out to the $146,000 that appears here.

Q. And in the line, the next line in that same year, Mr. Peoples, you show a figure for additional amortization of exchange franchises of approximately $288,000 and there is a parenthesis over on the caption
451 which indicates that the unamortized balance of $320,000, approximately, was written off in 1952.

Now those two figures taken together total something slightly in excess of $600,000, according to my mathematics. When Mr. MacMillen was on the stand, he estimated that the cost of writing off these franchises was something slightly in excess of $700,000, and would you undertake to reconcile his estimate with your figures.

452 Mr. Raftery: We object to that. What has that got to do with the distribution in the New York area?

The Court: I will allow the question.

Mr. Raftery: I won't object if it is received purely

as good mathematics—leave the "good" out—as mathematical calculations.

The Court: If this is a mathematical computation and Mr. Peoples gives it, I am sure it will be a good one.

A. The company was writing off the cost of acquiring the franchises over the ten-year period. That ordinarily would run to about $158,000 a year. That $158,000 for the entire year is included in expenses up above in the year 1951 and, of course, in 1950 and earlier years. So that from April 30, the approximate date of the sale, it would be about two-thirds of $158,000 for amortization included in expenses. Two-thirds of that is a little over $100,000. The $100,000 added to the $288,000, the figure you are asking me about, plus the writing off in the following year, comes to a little more than $700,000.

Q. Mr. Peoples, at my request, did you over the
452a week-end undertake to break out the film rental figures as between domestic and foreign? A. Yes, we did.

Q. Would you read—— A. I can give it to you in the form of a percentage. Perhaps if I read the the foreign I do not need to read the domestic, or I will give you both, whichever you prefer.

In 1946, foreign was 10 per cent, domestic 90; in 1947, foreign was 9 per cent, domestic 91; in 1948, foreign was 14 per cent, domestic 86; in 1949, foreign was 23 per cent, domestic 77 per cent; in 1950, foreign was 20 per cent, domestic was 80; and in 1951, foreign was 36 per cent and domestic 64 per cent.

By the Court:

Q. That is the revenue from distribution? A. The revenue from distribution.

Q. Nothing to do with production? A. Nothing to do with production. The producer, of course, gets his share of that. That is the total revenue from the pictures.

By Mr. Mcovern:

Q. If I got those figures correctly, you indicated
453 that the foreign share was 20 per cent in 1950. A. That is correct.

Q. And 36 per cent in 1951? A. Correct.

Q. Do you have any explanation for the sizable increase between 1950 and 1951 as to the foreign proportion of the total income? A. The explanation, I would say, is that the domestic income falls off faster when you are ceasing business, at it were, than the foreign does. You are still probably in 1951 getting some foreign income from the very active number of pictures that there were back in the earlier years.

Q. In other words, this reflects the fact that on April 28, 1951, the business was sold to United Artists? A. Yes.

Mr. McGovern: That is all.

Mr. Raftery: No questions.

Mr. Gillespie: No questions.

The Court: Are you offering the exhibit?

Mr. McGovern: I offer the exhibit, then, your Honor.

The Court: Is there any objection?

Mr. Raftery: I will object to it on the
454 ground that it is irrelevant. If your Honor wants to receive it as a mathematical calculation, I will concede that Mr. Peoples has mathematically correctly made up the exhibit.

The Court: I will receive it in evidence for such as it is worth.

Mr. Gillespie: Your Honor, I assume I have the same objection.

The Court: Same objection and you have an exception. I may say that I am taking it merely for what it shows and for what it is worth. I think its relevancy is rather difficult to ascertain, but such as it is, we will receive it.

(Plaintiffs' Exhibit 24 for identification received in evidence).

(Witness excused.)

Mr. McGovern: Your Honor, in reviewing the exhibits over the week-end, I noticed that we had not offered Plaintiffs' Exhibit 7 for identification, which was the Eagle Lion Films, Inc. license agreement with the Marcus Loew Booking Agency for T Men and Out of the Blue.

The Court: Is that the one that was indicated
455 as a typical contract?

Mr. McGovern: That is right.

The Court: Any objection?

Mr. Gillespie: Your Honor, we object to it as "typical." This is the contract for T Men between Eagle Lion Films and Marcus Loew Booking Agency, and we do not object to it as that in any respect.

The Court: I will receive it in evidence.

(Plaintiffs' Exhibit 7 for identification received in evidence.)

Mr. McGovern: And Plaintiffs' Exhibit 8 for identification was a series of Eagle Lion Film license agreements with the RKO circuit. I offer those for what they are, namely, license contracts with the RKO Circuit covering, I believe, four different pictures.

Mr. Raftery: So that we may identify them, would you be good enough, Mr. McGovern, to just give us the name of each picture?

Mr. McGovern: Yes. The first was Green for Danger. The date of that contract was January 19, 1948. The second was Canon City, October 4, 1948. The third The Smugglers, December 30, 1948; and the fourth Raw Deal, October 1, 1948.

456 The Court: Any objection to receiving it?

Mr. Raftery: No objection.

The Court: It will be received in evidence. That is Exhibit 8, then.

(Plaintiffs' Exhibit 8 for identification received in evidence.)

Mr. Wright: I would like to have marked as Plaintiffs' Exhibit 13-A for identification the part of the answers to the interrogatories by the defendant Loew, Inc., which contains the answers to the questions in part II relating to the theatre operations.

Your honor will recall that the answers by Loew's to part I are now in evidence as Exhibit 13.

The Court: What are these answers?

Mr. Wright: These are answers by Loew, Inc. to the questions as to their theatre operations which are contained in part II of the plaintiffs' interrogatories which are now in evidence, and they supplement the answer to part I which are incorporated in the document that is in evidence as Plaintiffs' Exhibit 13.

The Court: Plaintiffs' Exhibit 13 was used as the basis for certain questions which were addressed to Mr. Gross, I think it was.

457 Mr. Wright: Yes, and some of them were based also upon these answers in 13-A, which contains the data supplied by the Theatre Department of Loew's as distinguished from the Distribution Department.

The Court: This is a vast number of documents. I do not know what it means unless someone reduces it to some kind of form that is readily understandable. If it is introduced in evidence, I suppose I have to study it, and I do not know what it means in that form unless you make a summary of it.

Mr. Wright: I would be happy to go through it and explain what it is, what we have here.

This, as I say, must be read to be understood with section II——

The Court: What is the interrogatory and what is the answer?

Mr. Wright: The interrogatory, if I may have the exhibit, is this: This is section II.

"In addition to the foregoing information . . ." That refers to section I data which is already in evidence.

". . . Loew's, Inc. and Radio-Keith-Orpheum Corp. are directed to supply the following information:

"Give the names and locations of theatres
458 in the New York metropolitan area for which you or a company or a corporation either of which was subsidiary to or affiliated with you, negotiated film licenses during each of the calendar years 1944 through 1949 and the first nine months of 1950, and with respect to each such theatre state:

"II (a) Description of your interest, whether lease, fee interest, or otherwise, and the date of acquisition and date of changes, in any, of such interest. State specifically whether any other defendant in this suit had any interest in such theatre, and, if so, describe such interest, with date of acquisitions and date of change, if any, of such interest."

Now, the answer to that interrogatory was, by agreement, furnished for the years 1946 through 1950, and the list of those theatres which comprises theatres in the Loew metropolitan circuit appears on a two-page seedule called Schedule F, which is attached hereto. Now, that has on it all of the borough theatres which were included in the chart that was offered in evidence here.

The Court: That is the basis of that chart, is it not?

459 Mr. Wright: In addition to the data in the chart, the four theatres respectively located in Mount Vernon, New Rochelle, White Plains and Yonkers, which completed the circuit.

Your Honor asked the other day the difference, if any, between the metropolitan circuit theatres as defined in the complaint and those in the four boroughs, and the

difference is in those four first-run theatres in those four towns or cities which play with the first-run neighborhood theatres in New York, that is, in general play the same programs and the pictures were bought as part of the metropolitan circuit theatres.

The Court: I take it there is no dispute on that fact by anybody as to those four theatres?

Mr. Wright: This further shows, of course, the extent to which the ownership remained the same during this period.

The Court: Why is that relevant? What bearing does that have upon the issues in this case?

Mr. Wright: I think it is important for our purposes in showing the precise definition of the circuit theatres we are talking about when you are talking about the Loew's metropolitan circuit. This defines it for the purpose of this suit.

460 The Court: Mr. Wright, is there any dispute between you and the defendants as to what theatres are included in that circuit? If there is, maybe it is relevant. If not, then it is so much additional paper which does not mean anything.

Mr. Wright: I am in no position to say whether they dispute what I have just said or not. That is up to them.

The Court: Is there any dispute from defense counsel that those are the theatres included in the circuit?

Mr. Gillespie: I think we had an exhibit offered by Mr. Wright which shows certain Loew's theatres and RKO theatres, and your Honor received it subject to correction, and I do not think we had any particular correction. It might be off by one or two theatres.

The Court: If there is no dispute that those are the theatres, then we do not need this additional data. If there is any dispute—have you any doubt about that, Mr. Gillespie, that that previous exhibit showed the theatres?

Mr. Gillespie: Numerically speaking, I think it is entirely correct, your Honor.

461 The Court: What, Mr. Wright, do you want this additional data for, then?

Mr. Write: To show in addition to the theatres reflected on the chart in evidence there are included in the circuit these four first-run theatres in the four towns that I have named.

The Court: What are the names of the four theatres?

Mr. Wright: Those are, respectively, Loew's Mount Vernon, in Mount Vernon, New York, Loew's New Rochelle at New Rochelle——

Mr. Gillespie: I cannot hear you, Mr. Wright.

Mr. Wright: Loew's Mount Vernon, Loew's New Rochelle at New Rochelle, Loew's White Plains in White Plains, and Loew's Yonkers in Yonkers.

The Court: Now all this batch of data is just offered to establish that there are those four additional theatres; is that right?

Mr. Wright: No. There is a great deal more here than that. I am summarizing what is on this particular schedule. The data is also offered in this answer, of course, in response to the interrogartories of run in which the theatres played.

462 The runs, in so far as the theatres in the four boroughs are concerned, are indicated on the chart and this answer shows that these four theatres I referred to which were not in the four boroughs, not on the chart, that is, the Mount Vernon, Yonkers, White Plains and New Rochelle Theatres, were first run in those cities. Those were first run.

The Court: Is there any dispute about that, that those theatres were first run in those cities?

Mr. Gillespie: I think that is correct, your Honor.

The Court: Why do we need that additional data? That is conceded.

Mr. Wright: That is fine.

The Court: What more do you need?

Mr. Wright: If it is conceded, that is helpful.

Perhaps I had better read the next—in so far as II(a) is concerned——

The Court: Just tell me what the interrogatory is and what the answer it. Mr. Wright, I have puzzled over this week-end over these exhibits in this record, and I want to get something down which is definite. I
463 do not want you to hand me 75 pages of hand-written material and say this is relevant. I want you to show me what in there is relevant.

What is the interrogatory and what is the relevance of any answer?

Mr. Wright: The interrogatory is II(b), which says:

"As to each such theatre . . ."

That is, these theatres we have just referred to in the circuit.

> ". . . furnish the title of the feature pictures exhibited in such theatre during each of the calendar years 1944 through 1949 and the first nine months of 1950, together with the name of the distributor of each such feature picture and total gross rental and total net rental for the exhibition of such feature picture in such theatre."

The data we got in this Exhibit 13-A from Loew is as follows:

For the 1948-49 season they furnished us with this data: The name and play date and rental paid by the circuit for the theatres which played the so-called long-half of the week, that is——

The Court: I understand. Go ahead.

464 Mr. Wright: We got from Loew for that season 104 pictures which represented the top and bottom pictures that played the long-half of the circuit.

The Court: What do you mean by the top and bottom?

Mr. Wright: On the long-half of the week——

The Court: Did they give you the name of every picture they played in accordance with the interrogatory?

Mr. Wright: No, we did not have it. I am saying what we got was by agreement less than what was asked there.

The Court: What did you finally ask for by agreement? We are wasting a lot of time here. If you have an interrogatory which is amended thereafter by an agreement, why not read the interrogatory as it was amended?

Mr. Wright: It takes a rather long series of letters to do it, but the final result was—which I do not think there is any dispute about—they gave us the features that played long-half both top and bottom in the circuit during the 1948-49 season.

465 The Court: What do you mean by "both top and bottom"?

Mr. Wright: Those are double-feature bills, and they gave us the data for both the features.

The Court: For every feature that was played?

Mr. Wright: In the long-half.

The Court: All right.

Mr. Wright: That is what we got from Loew and those are the figures that are in here.

The Court: They gave you the revenue from those?

Mr. Wright: They show the revenue that the circuit paid for those pictures.

The Court: And to whom was it paid?

Mr. Wright: And the name of the distributor is here, yes.

The Court: You made a chart or a summary of all that.

Mr. Wright: And the distributor.

The Court: Have you made a summary of all that?

Mr. Wright: The only part of it we summarized was what you saw in the chart that was offered here,

466 which is undertook to show the division of product between the Loew and the RKO circuits in the 1948-49 season.

The Court: And you are offering this as the basis upon which that chart was prepared?

Mr. Wright: This is partly the basis for that chart, and it also is the basis for the chart which was put in which showed the percentage of rental that went from the Loew's circuit to all of the distributors. You may recall the pie chart.

The Court: Yes, I understand.

Mr. Wright: That is also based on this.

The Court: Mr. Wright, is there anything I should study in these figures that has any independent relevancy? You are offering here a batch of handwritten data, some 60 or 70 sheets. What am I supposed to look for in there?

Mr. Wright: We are not at this point asking your Honor to look for anything. We have summarized in chart form what we say has immediate relevance.

However, there is underlying data here which we believe should be in the record. It may become important for other summaries depending upon what occurs here in the course of the defense.

467 The Court: If this is offered as the underlying data used in connection with the preparation of the charts, of course I will take it, but I am not going to take it for anything other than that unless you prepare a summary and show the particular relevance of a particular item.

Mr. Wright: As to that data I have just referred to, that is reflected in the charts that I have just mentioned.

The Court: All right.

Mr. Wright: Then this also has the detailed playoff—this is in response to the same interrogatory there, II(b), the one I just read, which asked for the theatre-by-theatre rentals paid by the circuit. Those are in a schedule labeled Schedule H here and it is that Schedule H which shows what we have been describing as the circuit playoff, that is, this——

The Court: Has that been summarized in any document or chart?

Mr. Wright: The circuit playoff I do not believe has been summarized.

The Court: Then I am not going to take it. If you are going to give me a batch of those sheets of hand-
468 written material and expect me to analyze them and draw some conclusions from them, I am not going to take them. That is your job.

Mr. Wright: We do not expect or ask your Honor to make any analysis of this, because we do not think that the matter which this schedule shows is in any dispute at all.

The Court: Then it is not relevant, we do not need to consider it?

Mr. Wright: It certainly is relevant.

The Court: What is the relevancy? What does it establish, in three simple words?

Mr. Wright: It establishes that the first-run neighborhood theatres in the four boroughs amid these first-runs in the four towns I have mentioned generally played the same programs, that is to say, that the pictures were played off over the circuit, the Loew's circuit.

The Court: At the same time?

469 Mr. Wright: Simultaneously in all of those houses.

The Court: Is there any dispute on the part of the defendant?

Mr. Gillespie: I think there would be a dispute on that.

The Court: There would be?

Mr. Gillespie: Yes, your Honor.

The Court: Mr. Wright, you had better prepare some kind of chart which will exemplify that information and present it in evidence. Do not expect me to take that data and draw conclusions from it.

Mr. Wright: I think the data on its face does not require any conclusion. We have the play-off here. I think that ——

The Court: What does it show? Does it show 90 percent of them played at the same time?

Mr. Wright: It shows substantially what I said. You may find a slight variation from theatre to theatre, but in substance the fact is that those theatres did play the same programs.

The Court: What do you mean "in substance"—99 percent or 70 percent or what?

470 Mr. Wright: I cannot give you the precise number and character.

The Court: I am not going to do your mathematics for you, Mr. Wright. You prepare a chart. If you want me to draw a conclusion, you prepare the summary of it.

What is the next one?

Mr. Wright: The next interrogatory is the last one, Section II(c). It says: "As to each such theatre, the run and clearance terms on which it customarily played feature pictures played in (b) above . . ."

That is these pictures I just referred to.

". . . during each of the calendar years listed in (b) above."

On these answers, this same schedule H that I have just referred to shows the run of the theatre in question.

The Court: What does that prove that is relevant to this case?

Mr. Wright: Well, it proves what I have just said and which the defendants apparently deny, that these first-run neighborhood theatres and the first-runs in

471 the four towns did play the same programs together.

The Court: Always or in most cases?

Mr. Wright: I should say with very few exceptions.

The Court: Then you had better prepare a summary chart which we can submit to the other side and see if we can get some understanding of what we mean by "few exceptions."

Mr. Wright: If you want the exceptions summarized, we can do it.

The Court: You prepare a chart, because it is impossible for the Court to go through all of these sheets and draw conclusions when you yourself have been working on this case for five years and ought to really know what the facts are that you are establishing.

Is there any further interrogatory?

Mr. Wright: There are also attached here rental data which has not been summarized. It is individual rentals here which show the difference between what these pictures take out of the circuit, depending on whether it is the top billing or the lower part of the bill. Now——

The Court: What does that establish which
472 is relevant to this case?

Mr. Wright: I do not think there is any dispute about that. Its relevancy lies in the fact that this business of what rental you take out of the circuits depends on more than merely having your pictures shown by the circuit. A great deal depends upon where you get in and where you don't.

The Court: What does that show about this particular series of pictures that we are here interested in? What does it indicate?

Mr. Wright: As far as this particular series of pictures is concerned, the data shows that by far the greater part of the rental comes from the top-half pictures, the top picture on the bill.

The Court: You see, Mr. Wright, what you are doing is you are really testifying on the basis of answers to interrogatories. A case properly prepared would have those interrogatories marked, would have a witness take the stand and summarize what he draws from those interrogatories, and then he would be subject to cross-examination. You are trying to put the burden upon the Court of taking those answers to interrogatories and analyzing them. You ought to have somebody take
473 the stand and give the conclusions drawn from that.

Mr. Wright: We would be happy to do that. We

did do that with respect to the conclusions we thought would be controversial. We didn't assume there would be any controversy over these conclusions. If there is, we will have a man summarize them for you.

The Court: If there is no controversy about these facts, the facts are irrelevant. If there is controversy, you had better have them put in in the regular way. So I will, at the present time, deny your motion or your application to have this document marked in evidence.

Mr. Wright: I take it we can have it marked for identification.

The Court: It will be marked for identification, certainly.

(Marked Plaintiffs' Exhibit 13-A for identification.)

Mr. Wright: I would also like to offer with the next plaintiffs' number the interrogatory answers that were supplied to Section II of the plaintiffs' interrogatories by the RKO defendants in the suit.

The Court: Are you offering that in evidence?

474 Mr. Wright: And I am also making an offer of that.

The Court: What there is relevant in these answers?

Mr. Wright: We got the same kind——

The Court: Same data?

Mr. Wright: Similar data for the RKO circuit.

The Court: I understand.

Mr. Wright: There are also, with respect to RKO—RKO has a first-run theatre in each of these same four towns: Proctor's in Mount Vernon, Proctor's in New Rochelle, Keith's in White Plains and Proctor's in Yonkers, which did not appear on the chart, because they were not in the four boroughs.

The Court: I take it there is no dispute about that fact, is there?

Mr. E. Raftery: No.

The Court: If that is all it is offered for, it is unnecessary.

Mr. Wright, if you are going all through this again, obviously an answer to an interrogatory is an admission by a defendant and may be taken into consideration by the Court, but I am simply saying as the one who is directing the court procedure here, that I am not going to take a lot of looseleaf sheets that have been clipped together, many of them handwritten, which mean nothing by themselves, and if you want those to be considered by the Court, you either prepare a short summary of what they establish or put a witness on the stand who can testify as to what they establish and be subjected to cross-examination. The Court is not going to take upon itself the problem of analyzing these elaborate statistical summaries.

475

I will deny your request to mark them in evidence at the present time. They are marked for identification, and that is without prejudice to your right to offer a summary of them or to offer them after a witness has been put on.

Mr. Wright: If we can have a short recess, I will make a summary and put a witness on.

The Court: We will take a ten-minute recess.

(Plaintiffs' Exhibit 25 for identification marked.)

(A short recess.)

476 Mr. Wright: Will you take the stand, Mr. Gross.

Norman Gross

recalled.

Direct Examination By Mr. Wright:

Q. Mr. Gross, did you make an analysis of the interrogatory data that is contained in these exhibits that have been marked for identification as 13-A and 25, in order to determine which of the defendants' pictures

played in the circuits and which did not? A. Yes, sir, I did.

Q. In the course of that analysis did you determine how many there were that played long-half and how many played short-half? A. Yes, I did.

Q. Did you also determine how many there were that played the top billings long-half and how many played the lower billings? A. Yes, I did.

Q. Can you just give us those totals for the defendants' pictures as to which you had data?

First, you had better tell us how many of those pictures there were which had data of that kind

477 A. With respect to the 96 pictures, that is, 12 pictures from each company, that were the sample of the pictures from each company, I analyzed them as to where they played, or if they played in either of the RKO or Loew circuits.

Q. Of those 96 pictures, how many played one of those two circuits top feature long half? A. Of the 96, 42 of those pictures played one or the other of the circuits in prime position of the long half of the week, the top feature of the double bill.

Q. How many played bottom of the long half bill? A. Of those 96 pictures, 22 played on the long half of the week as the second feature or flat rental picture.

Q. How many of them did not play either of the circuits at all? A. Of the 96, 15 had no play on either one of the circuits, either long half or short half.

Q. Have you the corresponding figures there for the 196 Eagle Lion films that you testified about before? A. Yes, I do.

478 Q. Would you please give us those. A. Of the 196 pictures, that were all of the pictures released by Eagle Lion in the four years, eight of them played long half of the week, either as the top picture or as a split on the top. On some occasions there are two pictures of apparent equal weight that played long half split.

There is no second. They played the same weight. Eight of them of 196.

Q. Can you tell us which of the eight were split billings and which were the top pictures? A. Not from this material here. There were, I think, two of the eight were part of split billings.

Q. Do you have the number that played as bottom picture on the long half? A. Of 196, 24 played as a second feature on the long half.

Q. Then how many played the short half? A. Forty-eight of the 196 played short half.

Q. And how many did not get into either of the circuits at all? A. Of the 196, I have 116 that didn't play either long half or what is considered short half.

Q. Of the circuits? A. Of the circuits.

479 Q. Then do you have the—can you just give us the average subsequent-run rentals of—first, for the defendants' pictures by each of those categories on Eagle Lion.

Mr. E. Raftery: I object to average of film rental. The film rental depends on the gross receipts, whether it is a percentage picture or something. In other words, what we have here indicate rentals. We have to know what he is talking about.

The Court: Isn't that so, Mr. Wright? How can you average where some of them depend upon the gross receipts?

Mr. Wright: I think for this purpose of showing the relative value to the distributor of the top and lower billings, that an average is a perfectly sound method. We have, of course, individual rentals, which are all contained in those answers to interrogatories.

The Court: Let me ask you this. You have got here the rentals of all the pictures, have you, or only of these selected pictures?

Mr. Wright: He is giving you, as I understand it, all that he has.

The Court: I mean——

480 Mr. Wright: This list.

The Court: In these answers you got from the defendants, did they give you the rentals from all the pictures shown over the period or just the rental of these particular test pictures that you are using?

Mr. Wright: The only metropolitan subsequent-run rentals we have from them are on the 96 picture sample.

The Court: I see. Well, I will let the question be answered.

Q. Will you just give us the average metropolitan subsequent-run rental that the defendants received for the part of their 96 pictures that played long half top billing. A. Of the 42 pictures that played the long half top of the bill, the average New York metropolitan less the first-run, that is what we have been talking about as subsequent-run New York, they averaged $190,000 a picture.

Q. How about on the——

Mr. Gillespie: I move to strike out that answer because it does not apply to the Loew circuit or the RKO

481 circuit. There is included in there, if I am not mistaken, all of the theatres in the metropolitan area.

Is that not correct, Mr. Gross?

The Witness: That is correct. I labeled it that way.

The Court: How then does that come out of data that this man has been testifying about?

Mr. Wright: We did get the data from the distributors on these 96 pictures, not only with respect to what the circuits paid but what the following subsequent runs paid as well.

The Court: So this is not based on the answers to the interrogatories that you have had identified; this is based on other data?

Mr. Wright: It is based upon both. The playing in the circuit comes from these identified interrogatories fur-

nished by the exhibitor defendants. The other data, I believe, comes from——

The Court: Why not get the data on the circuits—did you average it on the circuits?—and then go into the other, if he has that?

Mr. Wright: I don't think he has the circuit data broken down.

482 Q. You can, I take it, from your figures, construct the same average for the circuit as distinguished from the complete metropolitan sub-run; is that right, Mr. Gross? A. I don't have it here. We could do it, yes.

Q. How much of a job would it be? Can you break it down readily? A. Not before tomorrow.

The Court: Then what you are asking is what was the average revenue from the entire metropolitan area less the first run of these pictures. All right, I understand it. You may answer it.

The Witness: I have finished it with respect to the long half, top half feature, of the 96, your Honor.

Q. What is the figure for the long half bottom feature? A. The long half second feature, of which there were 22 in these samples, the average is $40,000.

Q. How about the short half? A. The short half, of which there were 17, the average is $16,000.

Q. Then when the picture did not get into the
483 circuit at all, the subsequent run? A. The average of these 96, of which there were 15, averaged $2,500.

Q. Can you give us the comparable figures for the Eagle Lion pictures? A. Of the 196, there were eight that played the long half top, and their average was $101,000 in the subsequent-run area.

Q. Those that played the bottom of the long half? A. The long half second features averaged $30,000.

Q. Then those that played short half? You'd better give the numbers in each case. A. The $30,000 previously mentioned covers 24 pictures.

There were 48 pictures of Eagle Lion that played the

short half and averaged $7,500 each, and there were 116 that played neither long half nor short half and averaged $4,000 each.

Q. Those were the Eagle Lion pictures? A. Those were the Eagle Lion pictures.

Q. That didn't get into the circuits at all? A. That's right.

484 Q. Can you tell us how many pictures of the defendants, for which you have data, how many pictures you have for the defendants, for which you have data all told, that got into the circuit during this period?

The Court: What is that? I don't understand your question.

Q. As I understand it, Mr. Gross, while you only have data for 96 of the defendants' pictures broken down to show the subsequent rental, you do have certain more limited data for other pictures of the defendants; is that right? A. That's right.

Q. And, well, what is that more limited data that you have for the other pictures and how many of them were there? A. Well, while the interrogatory answers took the trouble to dig out this specialized metropolitan area, they were required to reply to 96 pictures, that data much more easily available to the distributors was the New York exchange data and the national data on some 378 pictures, which roughly comprise one-third of all the pictures distributed by them in the four years.

Q. Do you know how that one-third sample was obtained? A. Each distributor for each season lined

485 up his releases for the year in the order of their national film rental, and they took the first picture and the fourth picture and every third picture through the list, but they were not required in that instance to break out the metropolitan, that we accepted from them on those pictures, on the exchange.

Q. As to those pictures, did you look at these exhibits that have been marked for identification, the answers fur-

nished by the circuits, to determine which of them got onto the circuits? A. Yes, I did.

Q. Can you give us those results, as to how many of those pictures got a circuit play-off? A. Of 378 pictures, I have 305 that played on the circuit in one in the long half or short half or second feature.

The Court: Played either on the——

The Witness: Played in any position.

The Court: In RKO or Loew?

The Witness: Yes.

The Court: Either one of these two circuits?

The Witness: Yes.

Q. Did you break that by the categories in accordance with the categories that Mr. Raftery has
486 used in cross-examining you? A. Yes, I did.

Q. Will you tell us the results in each category.

The Court: What are the categories?

Q. Beginning with, I believe, those that played the—the first one you have there is the pictures that played so-called first-class theatres on first run New York? A. Yes. Do you want the other distributors as well as Eagle Lion?

Q. I am talking only now about the eight distributors who are involved in the interrogatory answers. A. Of the 378 features, of which we have this information from the interrogatories, 219 played in a first-run, first-class theatre, by Mr. Raftery's definition of a first-class theatre, and of those 219, 215 played on the circuit, either the RKO or the Loew circuit.

Q. Eagle Lion had had how many pictures that played those same theatres, first run-theatres, New York? A. Twenty-four of Eagle Lion played in a first-class, first-run theatre.

487 Q. Of those, how many got on the circuit? A. Twenty-one.

Q. As to the next category, can you give us the same figures for the defendants' pictures and for Eagle Lion?

That was, I believe, first-run, those pictures which had a first run in a second-class—— A. That is correct.

Q. ——first-run theatre. A. The eight other defendants, distributors, 37 of 378 played in a—had their first run in a second-class theatre, and 32 played on a circuit.

Q. Of those 37? A. Of those 37.

Q. What are the corresponding figures for Eagle Lion? A. Sixty-four of our 196 had first run in New York at a second-class theatre, and 30 of them played on a circuit.

488 Q. I think the other category he mentioned was the pictures which had no first run in New York City. Will you give us those for the defendants and then for Eagle Lion. A. Of the sample of 378, 83 of the other distributors' had no first run New York, and 56 of them played on the circuit. Eagle Lion had 80 pictures that had no first run and 24 of them played on a circuit.

Mr. Wright: You may cross-examine.

The Witness: I would like to make a correction of one figure. May I?

Q. Surely. A. I said earlier of the 378, 305 played the circuit. Actually, I left out one figure. 330 of the 378 played the circuit for the other distributors.

By the Court:

Q. Let me ask you this: Of this 378 were there any reissues included? A. Yes, sir, there were reissues, there were westerns, there were——

Q. What proportion were reissues? Have you any idea? A. Yes, I do, if I can get another figure.

489 There were some 22 reissues of the other defendants.

Q. Out of 378? A. Actually, this figure is now 354. We had two sets of samples, every third and 96, and in some cases they coincided, same picture.

Q. What I want to find out—— A. Was out of 354, in this instance.

Q. Out of 354—— A. There were 22 reissues of the other distributors.

Q. Where did they get shown? Any breakdown of that? A. I don't have it broken down that way. Some of them played and some of them did not.

The Court: All right. You may cross-examine.

Cross-Examination By Mr. Raftery:

Q. Did you do the same job on the pictures that played the art, so we will complete the whole—— A. Yes, I did.

Q. Let us have what happened to the art pictures. Did they play in the circuits after they got through playing the art theatres? A. Of that larger 379 pictures, 9 of them played at a first-run art house and 3 of them played on a circuit.

490 Q. That is, of the eight distributors? A. Of the eight distributors.

Q. How about Eagle Lion? A. Eagle Lion had 22 that played first-run art houses and none of them played on the circuit.

Q. Let us see. How about Quartette? A. I have another piece of paper somewhere.

Q. I probably can help you on that. A. Quartette?

Q. Yes. A. Played the Sutton. I have no indication that that played on the circuit.

Q. Now, if it didn't play the circuit, then you did find a place for it to play in the metropolitan area and you have included a substantial amount of money as money coming from New York metro for Quartette, is that right? A. I certainly have, $173,000 for the New York metropolitan for Quartette, of which $121,000 was received on its first run at the Sutton Theatre.

Q. But you did get how much money on Quartette from the metropolitan area? A. $173,000.

Q. I mean the difference. Leave out the first—A.

491 Leave out the first run? Approximately $52,000.

Q. Isn't it a fact that on each of the art pictures,

say, Kind Hearts and Coronets, you got $61,000 first-run film rental from the Trans-Lux, 60th Street, isn't that right? A. That is correct.

Q. Then you got $96,000, is the figure, from New York met? A. Not this. That 96 includes 61.

Q. So you got thirty thousand what? A. $35,000.

Q. You got that somewhere in the metropolitan area? A. That is correct.

Q. You either got it from the RKO or Loew or from some of the other six or seven hundred theatres in the metropolitan area, isn't that a fact? A. That is absolutely correct.

Q. That applies to either one of these pictures listed as art pictures with the exception of Blue Lamp, which shows you got $15,000 rental for the first-run from the Paris Theatre and nothing more included in New York met,
492 isn't that a fact? A. That is correct.

Q. Was that due to the fact that Blue Lamp was a later release and was not released to the neighborhoods until after this law suit was begun? A. I will have to check that. I am not sure.

Q. You got a little more money on it somewhere here, according to the national, in addition to the $15,000 you got out of the Paris. Your total amount you got nationally, on your figures, was $18,700? A. As of the closing of the figures. I am not sure when that was released. It may have been a late release. I will have to check.

Q. Isn't it a fact, on these New York pictu4 out of the New York metropolitan area, including your first run—let us check New York exchange to your first run. You got almost 35 per cent of the gross out of New York exchange? A. That is correct.

Q. On the art? A. That is correct.

Q. And if it played in the neighborhoods and you weren't able to get into, we will say, the RKO or the Loew houses, you were able to pick up $205,300 out of the New
493 York metro exclusive of first-run? A. By the same token, if we had played the circuits we might have gotten 80 per cent of the rental out of——

Mr. Raftery: I move to strike it out.

Q. You picked up $205,300.

The Court: Are you sure your figure is right?

Mr. Raftery: He has them right there.

The Witness: Absolutely right.

Q. In other words, you got 14.3 per cent of your national gross out of the neighborhoods in New York City on this group of pictures? A. Precisely, 14.3.

Mr. Raftery: That is all.

Cross-examination by Mr. Gillespie:

Q. Mr. Gross, I understood you to say that Eagle Lion averaged $101,000 film rental on the Eagle Lion pictures that played long-half top billing? A. That is correct.

Q. Does that $101,000 include monies received not only from either the Loew's or RKO circuit but from the six or seven hundred theaters in the metropolitan area? A. Yes.

494 Q. In other words, all of these figures are based upon rentals received not only from Loew's and RKO circuits but from other sources in the Metropolitan area? A. As they appear.

Q. Mr. Gross, have you made any breakdown of these figures of yours that you have presented here, and the ratios, in respect of these pictures of yours that have had a lower national gross than some of the more important pictures, let us say, like T Men, and compared them at all with the pictures, lower-grossing pictures of the eight major distributors that you have been testifying about here? A. Yes, I did.

Q. Have you got that available? A. In a minute. I'll get it.

Q. Do you have that? A. Yes.

Q. Breakdown, Mr. Gross? A. Yes.

Q. Is that broken down by pictures that grossed nationally under $100,000? A. Yes, sir.

Q. How many of the Eagle Lion pictures grossed
495 under $100,000? A. 97.

Q. Do you have the figures of how many of the eight distributors' 96 pictures grossed under $100,000? A. Seven.

Q. Do you have the ratios of the New York metropolitan rental less first run to the national rental less New York metropolitan plus first run? A. Yes, sir.

Q. And that is computed on the same basis as your overall ratios that you have presented here previously? A. Identical basis.

Q. What does that ratio show of those 97 to 7 under $100,000? A. It shows for Eagle Lion, that it was 6.9 per cent, and the 7 pictures for the other distributors, 5.2 per cent.

Q. In other words, on the eight distributors' 96 pictures the gross nationally under $100,000—— A. 7.

Q. 7 pictures, under $100,000. Eagle Lion actually did better in its ratio of New York metropolitan to the
496 national than did the eight distributors? A. That is correct.

Q. By how much? A. Percentagewise?

Q. Yes. A. Difference between 6.9 and 5.2.

Q. Which is—— A. 1.7.

Q. (Continuing) —1.7? Do you have a breakdown of the pictures between $100,000 and $200,000 of national gross? A. Yes, sir.

Q. How many Eagle Lion pictures of the 196 had grosses in that range? A. 51.

Q. What was the ratio of those pictures? A. 5.4.

Q. Do you have a breakdown of the 96 pictures on that basis? A. Yes, sir, 10.

Q. How many pictures were there? A. 10.

Q. What was the ratio on those? A. 4.9.

The Court: Ratio of——

The Witness: Same ratio.

497 Mr. Gillespie: That is the ratio of New York metropolitan rent less first run to the national rent less New York metropolitan plus first run.

Q. That is the same basis on which you have computed this .064 to .089? A. That is right.

The Court: Yes, you have got this four point something. Is that Eagle Lion ratio or which?

Mr. Gillespie: Those are the eight distributors, 4.9, as I understand it.

The Witness: That is right.

498 Q And Eagle Lion was 5.4; is that correct? A. That's correct.

Q. In other words, Eagle Lion's ratio on those pictures from $100,000 to $200,000 was better than the eight majors on their ten pictures? A. Yes, sir.

Q. In that classification. How much? A. The difference between 4.9 and 5.4, .5 percent.

Q. Do you have a breakdown from $200,000 to $300,000 national gross? A. Yes, sir.

Q. And how many of the Eagle Lion pictures were in that category? A. Ten.

Q. And what was the ratio of the New York metropolitan rent less first run to the national rent less New York metropolitan plus first run? A. 6.7.

Q. And do you have the breakdown on the eight distributors? A. Yes, sir.

Q. How many were there? A. Seven.

499 Q. There were seven in that category? A. That's right.

Q. What was the corresponding ratio? A. 6.6.

Q. So it is 6.6 for the eight distributors to 6.7 on that category for the Eagle Lion pictures; is that correct? A. Eagle Lion is 6.7, the others 6.5—rather 6.6.

Q. In other words, Eagle Lion was one-tenth of one percent better off on those pictures? A. That's right.

Q. On the category of $300,000 to $400,000, do you have the breakdown on this for Eagle Lion and for the eight distributors? A. Yes, sir.

Q. And what are the ratios on the same basis there? A. Eagle Lion 5.9, the other distributors 5.1.

Q. In other words, Eagle Lion was .8 percent better off in that category? A. They had a higher ratio of .8 percent.

Q. How many pictures were there of the eight majors in that category? A. Six.

500 Q. And how many of Eagle Lion in that category? A. Sixteen.

Q. $400,000 to $500,000, do you have a breakdown on that? A. Yes.

Q. What were the ratios there? A. Eagle Lion 8.6, other distributors 7.1.

Q. And Eagle Lion on that basis was 1.5 percent better off; is that correct? A. It had a ratio of 1.5 higher than the others, yes.

Q. How many pictures did Eagle Lion have in that category? A. Three.

Q. And how many did the defendants? A. Five.

Q. Do you have a total figure of the number of Eagle Lion pictures that grossed less than $500,000 a year as shown on your Plaintiffs' Exhibit 11, which I assume is what you have computed these figures from?

Perhaps we can do this—I will withdraw the question.

Mr. Gross, what is the total number of pictures as you have related them to me under $500,000 national

501 gross? Do you have that? Eagle Lion. A. Under $500,000?

Q. Yes. A. I will add them up. 177.

Q. 177 pictures out of the 196 grossed nationally less than $500,000; is that correct? A. That's correct.

Q. And do you have the overall ratio on that for those pictures? A. For those 177?

Q. Yes. A. That grossed less than——

Q. That grossed less than $500,000. A. No, I do not.

By the Court:

Q. But on those the ratio was higher for Eagle Lion than for the other distributors according to what you have said?

Mr. Gillespie: In each category.

Q. In each category; is that correct? A. That's right.

By Mr. Gillespie:

Q. Do you have the number of pictures of the eight
502 distributors that grossed less than $500,000 nationally? A. Of the 96?

Q. Of the 96, yes. A. 35.

Q. So that in respect of those thirty-five pictures as compared to the 177 pictures which grossed less than $500,000, Eagle Lion did better in its ratio of New York metropolitan to national; is that correct? A. We went through it category by category, and in each category Eagle Lion's ratio was higher than the other distributors' ratio.

Q. So that as to the total, Eagle Lion's ratio would be better than the defendants'? A. Not necessarily.

Q. I have got the figures here, Mr. Gross. Maybe you would like to check them. A. Do you understand why not necessarily?

Q. But you have not computed them, that is the point. A. I said not necessarily. That's right.

Q. I ask you whether you have computed them for these pictures under $500,000, the total. A. No, I didn't take that total.

503 Q. Correct. And you say the total may not necessarily be the same as the sum of each of the parts? A. That is not the sum of each of the parts. You want to add averages and divide them, and you run into trouble unless you know what you are doing. It is conceivable that——

The Court: That is what I thought.

Q. Mr. Gross, perhaps you cannot do it right at the moment, but I will ask you during recess if you would total

the national rent less New York metropolitan plus first run for each of these categories and the New York metropolitan rent less first run for each of these categories, and then strike your figure on that basis, which would not be a case of averaging averages, and then give us that figure when you finish.

The Court: Are you going to do the same on those that grossed above $500,000?

Mr. Gillespie: If the other side wants to do that, I would be quite willing they should do that.

The Court: I would like to have that done also.

Mr. Gillespie: That is understandable, your Honor.

504 The Court: I would like to get the whole picture.

Mr. Gillespie: Our point in bringing this out, of course, is the statement that has been made here that on the lesser pictures here of Eagle Lion they have not been given the same treatment that the lesser pictures of the eight distributors have been given.

The Court: Now you have got in this list all except about twenty pictures, I guess, haven't you?

The Witness: Of Eagle Lion?

The Court: Yes.

The Witness: That's correct.

Mr. Gillespie: Eighteen, to be exact.

The Witness: Nineteen.

Mr. Gillespie: Your Honor, might I say The Red Shoes is in there twice because it had the roadshow and the general release.

The Court: Then there are eighteen or nineteen pictures?

Mr. Gillespie: That is right.

The Court: If the ratio varies the other way on those pictures, then I would be very much interested in knowing what the situation was on those particular pictures.

504a Mr. Gillespie: How we played those pictures?

The Court: Then you begin to pinpoint a situation. All right, we will adjourn until two o'clock for lunch.

(Recess until 2:00 p.m.)

505 *Afternoon Session*

Norman Gross resumed.

Cross-examination continued by Mr. Gillespie:

Q. Mr. Gross, did you, during lunch hour, have opportunity to make those totals of the various classifications under $500,000? A. Yes, I did.

Q. And what did you get on the Eagle Lion 177 pictures for the aggregate national rent less New York metropolitan plus New York first run? A. The ratio?

Q. I am not asking for the ratio. I was asking for the dollar figure at the moment. A. $19,814,700

Q. Right. Now for the aggregate of the New York metropolitan rent less first run on Eagle Lion. A. $1,231,500.

Q. For a ratio of— A. 6.2.

Q. On the 35 pictures of the eight majors that grossed less than $500,000, what did you get as the aggregate national rent less New York metropolitan plus New
506 York first run? A. $7,510,000.

Q. And for the aggregate of the New York metropolitan rental less first run? A. $446,100.

Q. What is that ratio? A. 5.9

Q. So that on the total of 177 pictures that grossed nationally less than $500,000, the ratio on the Eagle Lion pictures was 6.2 and that on the 35 pictures of the eight distributors was 5.9 percent? A. That's correct.

Q. For a total of .3 of a percent in favor of Eagle Lion? A. The difference is .3 of a percent.

Q. Correct. Did you thereafter compute the ratio in respect of the 19 pictures or 18—I believe The Red Shoes is in there twice—with national grosses of over $500,000? A. Well, that we had done a long time ago.

Q. I see. And what does that come to? A. Of the 19 over $500,000 the ratio is 6.7.

Q. And on the 61 pictures of the majors over $500,000 what does the ratio come to? A. 9.2.

507 Q. For a difference of 2.5 percent? A. In favor of Eagle Lion. Eagle Lion was 2.5 percentage points less than the eight other distributors.

Q. Mr. Gross, do your papers show or can you tell from your papers the 18 or 19 pictures of Eagle Lion that grossed over $500,000 nationally? A. I could pick them out.

Q. Could you please do that. A. You want the title of the picture?

The Court: The title of the picture is what he wants.

Mr. Gillespie: Excuse me. Your Honor, before I go to that, your Honor suggested that you would like to see the whole picture. I, during the lunch hour, got a schedule which I think sets forth precisely Mr. Gross's testimony as to these totals and the respective percentages and ratios.

I would like to mark that just for identification, if I may, in case your Honor would want to——

The Court: Do you want to offer it in evidence as a summary of that testimony? Would there be any objection?

Mr. Wright: Are you offering it?

508 Mr. Gillespie: As a summary of his testimony.

Mr. Wright: You are offering this in evidence?

Mr. Gillespie: Yes.

Mr. Wright: If the witness says it is accurate, certainly it is not objectionable on that ground, but it is objectionable, I think, if it is offered for the purpose of showing that our damages were limited to any particular class of pictures. It is, of course, our position that this is not our breakdown. If it is as part of his defense, I suppose he may show this, but in the first instance our claim is based on what happened to our entire product and not just any one segment that you may pick out by using either a gross classification or these other classifications we have heard about.

The Court: I realize that what inferences may be drawn from it can be a matter of argument, but if the figures are an accurate summary of what this witness has testified to, I think it would be proper to have it in evidence.

Mr. Gillespie: That is all it is, your Honor. I thought for a matter of facility—it is just putting
508a them down in one place, that is all.

The Court: I will receive it in evidence then unless there is some objection to it on the ground of accuracy.

(Defendant Loew Exhibit B received in evidence.)

509 Q. Mr. Gross, I believe you were going to go through Plaintiffs' Exhibit 11 and point out to me the pictures, the 18 pictures, that had a national gross of over $500,000. A. T Men, Red Stallion, The Noose Hangs High.

Q. Excuse me just a minute. That is a little bit too rapid for me. T Men, Red Stallion, yes. A. The Noose Hangs High.

Q. Yes. A. Canon City.

Q. Yes. A. Raw Deal.

Q. Yes. A. Out of the Blue.

Q. Yes. A. Mickey.

Q. Yes. A. Ruthless.

Q. Thank you. A. Red Shoes roadshow, Tulsa, He Walked By Night, Northwest Stampede, The Big Cat.

Q. Excuse me, the Big Cat? A. That is right. Let's Live a Little, Red Stallion of the Rockies.

Q. Yes. A. The Red Shoes general release, Destination Moon, Sundowners, Jackie Robinson Story.

Q. Yes. A. Right.

Q. Correct, it tallies with my understanding of
510 it. Do you have any records which will show how these pictures, these 18 pictures, were exhibited on first neighborhood run in the metropolitan area? A. We can pick that out as we go along.

Q. All right; I have made a list of this. T Men. A. Played Loew circuit.

Q. Do you know how it played? A. Long-half top.

Q. Long-half top billing, right? A. That is correct.

Q. Out of the Blue? A. Skipping some pictures?

Q. I happen to have them in just a different sequence than you did. A. Out of the Blue, Loew, long-half, second feature.

Q. Let's Live a Little. A. I don't have them in your order, and you are jumping around. Give me some time.

Q. I am sorry. A. Let's Live a Little, Loew, long-half, second feature.

Q. Did you give me He Walked By Night previous-
511 ly? I didn't have it checked. A. Not yet. He Walked By Night, Loew, long-half, top.

Q. So far, all of them are long-half? A. That is correct.

Q. Tulsa? A. Loew, long-half top, or split—split billing.

Q. Split billing, equal billing? A. Equal billing, that is right.

Q. Red Stallion? A. Well, there is a Red Stallion and a Red Stallion of the Rockies.

Q. I want just the plain Red Stallion. A. Loew, long-half, second.

Q. So far we are still on long-halves, correct? A. Yes, that is right.

Q. Mickey. A. Loew, long-half, second.

Q. Ruthless. A. Loew, long-half, second.

Q. Northwest Stampede? A. Loew, long-half, second.

Q. Red Stallion in the Rockies? A. Loew, short-half.

Q. Loew, short-half? A. That is right.

512 Q. Up to this point, Mr. Gross, as I understand it, all of these pictures, except Red Stallion in the Rockies, have played the Loew's circuit first neighborhood run long-half either top feature or second feature? A. That is correct.

Q. Canon City? A. RKO, long-half, top.

Q. Raw Deal? A. RKO, long-half, second.

Q. Red Shoes general release? A. RKO, long-half, top.
Q. Destination Moon? A. RKO, long-half, top.
Q. Sundowners? A. RKO, long-half, second.
Q. Jackie Robinson Story? A. RKO, long-half, top.
Q. The Noose Hangs High? A. RKO, long-half, second.
Q. The Big Cat? A. RKO, long-half, second.
Q. So every one of those pictures which I have questioned you about, beginning with Canon City, down to Big Cat have played the RKO first neighborhood run long
513 half either top billing or second feature? A. That is correct.

Q. I didn't ask you about the Red Shoes roadshow, which makes the 19th picture here, over $500,000. I don't know whether it ha dany neighborhood run. A. No, no circuit it played in.

Q. So we can say that all 18 of the pictures with over $500,000 national gross of Eagle Lion, except Red Stallion in the Rockies, were played at either the Loew's or the RKO circuit first neighborhood run, top-half? A. I don't know if you covered all those pictures.

Q. I did cover all those pictures, the 18 pictures. A. As I answered, yes.

Q. The answer is Yes. And the Red Stallion in the Rockies played short-half on the Loew circuit? A. That is correct.

Cross-examination by Mr. Raftery:

Q. Mr. Gross, I would like to ask you a few questions about this last exhibit. Of the 19 pictures of Eagle Lion that grossed over $500,000 nationally, which picture had the highest gross and how much? I think it was the Tulsa, if it will help you to find it. A. I cannot find it. Red Shoes roadshow $1,980,000——
514 Q. I asked in national release. Red Shoes—the roadshow—was at the Bijou Theatre here in New York and was not a national release, isn't that a fact? A. It was roadshowed at first, yes.

Q. I am not asking you about any roadshow. A. You want the next picture?

Q. Yes. A. Tulsa.

Q. What did it gross? A. $1,629,000.

Q. Will you look at the list where you got the 61 pictures over $500,000 that appear under eight distributors and tell me what pictures in that group grossed over $5,000 and up to $1,600,000-odd, the same gross as Tulsa? A. Over $5,000?

Q. $500,000. A. You said $5,000. The pictures of the 96 that grossed over five hundred—what the titles and the grosses?

Q. But less than $1,630,000. A. Paramount picture, Sainted Sisters, $1,209,400.

Q. What is the next one? A. Another Paramount picture, the Accused.

Q. Yes. A. $1,291,600.

515 Q. Right, and the next one? A. What was the Tulsa figure, please?

Q. $1,630,000. I am rounding out the 629. A. Paid in Full, Paramount picture, $757,100.

Q. Yes. A. Fox picture, Fighting Man of the Plains, $1,244,500.

Q. Yes. A. Fox picture, Under My Skin, $588,000.

Q. Yes. A. Warner picture, To the Victor, $716,500.

Warner picture, Colorado Territory, $1,522,000.

Caged, Warner picture, $1,137,000.

Love Laughs at Andy Hardy, Loew, $1,565,700.

Boom Town, $740,200. That is Loew's.

Loew picture, Desire Me, $1,370,200.

Loew picture, Tenth Avenue Angel, $679,800.

Loew picture, Hills of Home, $1,305,900.

Night at the Opera, Loew, $545,000.

Q. Your next one? A. Loew picture, Doctor and the Girl, $553,000.

RKO pictures, Woman on the Beach, $697,800.

Q. Yes. A. Race Street, RKO picture.

Q. R-a-c-e? A. R-a-c-e.

Q. The amount? A. $918,900.

516 RKO picture, The Window, $771,500.

Columbia picture, Johnny O'Clock, $1,512,700.

Columbia picture, Relentless, $1,573,900.

Columbia picture, Lust for Gold, $1,221,300.

Columbia picture, Jungle Jim, $508,900.

Columbia picture, Miss Grant Takes Richmond, $965,200.

Universal picture, Buck Privates Come Home, $1,519,000.

Universal picture, The Wicked Lady, $526,800.

Universal picture, Black Bart—B-a-r-t—$1,159,500.

Universal picture, The Saxon Charm, $624,100.

Universal picture, Red Canyon, $1,305,400.

Universal picture, Johnny Stool Pigeon, $666,500.

Universal picture, Louisa, $818,700.

Universal picture, South Seas Sinner, $727,100.

United Artists, Ramrod, $1,264,500.

United Artists, Bachelor's Daughter, $691,600.

United Artists, Pitfall, $1,259,500.

517 United Artists picture, Lured—L-u-r-e-d—$794,700.

Q. Lured? A. Lured.

Q. Seven hundred what? A. $794,700.

United Artists picture, Africa Screams, $1,337,700.

United Artists picture, Love Happy, $588,600.

That is all the pictures between $500,000 and the Tulsa figure of $1,630,000.

518 Q. What was the largest gross you had in the 61 of any of these eight distributors' pictures that are included in the 61, the largest domestic gross?

Let me put it this way and save you time. A. I have it now.

Q. What is the first—— A. Blue Skies, Paramount.

Q. What is its domestic gross? A. $5,459,500.

Q. And what is the highest gross of the next company you have on there? A. Fox, $2,617,300 for Yellow Sky.

Q. And what is the highest gross of the next company? A. Warner, $2,483,500, The Voice of the Turtle.

Q. And what is the next company? A. Loew, The Hucksters, $3,435,400.

Q. And the next company? A. RKO, The Farmer's Daughter, $3,123,200.

Q. And the next one? A. Columbia, Johnny O'Clock—I am sorry—Relentless, $1,573,900.

Q. The next company? A. Universal, Buck Pri-
519 vates Come Home, $1,519,000; and United Artists Africa Screams, $1,337,700.

Q. So that all the other pictures that are used in this 61 grossed somewhere between $1,630,000 and the $5 million-plus that you gave us for Blue Skies; is that right? A. That's right.

Mr. Raftery: That is all.

The Court: Are you through, Mr. Gillespie?

Mr. Gillespie: Yes.

The Court: Let me ask the witness one question.

By the Court:

Q. Looking at Exhibits 7 and 8, which are contracts for the exhibition of some of these pictures, I notice that the rental is determined in part on the gross receipts. A. Yes.

Q. I have noticed, for example, T-Men and Out of the Blue, which is referred to—— A. That's right. As a general practice, and with rare exception, the long half picture, top of the double bill that is on long half, is almost invariably a percentage arrangement or a variation of
520 a percentage. Either it would be a straight percentage of the gross taken at the box office or it would be a percentage over certain figures that the circuit would set up either as a house expense figure or some other arbitrary figure, and there are always what you could call sliding scales where the percentages vary with the amount of box office tickets sold.

Q. Then on these pictures that you have referred to here, Eagle Lion pictures which grossed over $500,000 nationally, if they did not do as well in the circuit, how much of that is

due to the fact that they did not have the box office appeal so that the revenue did not come to the box office? A. The only other element would be the terms on which it played and the percentage terms were not always the same.

Q. That is right, but aside from the percentage terms it would depend upon the box office appeal, would it not? A. If it played a comparable time, the long half, it would have the opportunity to earn the admissions at the box office and your rental would depend on the terms you took of those admissions.

The Court: There has been no evidence given
521 here as to any difference in the terms except generalities so far.

All right, I think that answers my question.

Have you any further questions?

Redirect examination by Mr. Wright:

Q. Following up his Honor's question, I take it the bottom picture on the bill generally plays at a flat rental and those rentals do appear in the interrogatory answers that have been identified here. A. The circuit rentals?

Q. Yes. A. The circuit rentals as they appear in the interrogatories, the answers of the circuits——

Q. Is it a fact that where the circuit deals for a bottom picture, the rental is generally a flat rental? A. That's correct.

Q. And these box office returns are always for a double feature, isn't that so? A. The box office receipts are for a double feature, that's correct.

Q. And there is no allocation by the theatre for
522 purposes of the payment of film rental of the box office receipts between the bottom picture and the top picture, is there? A. No, they don't allocate the receipts in any fashion.

Q. So that as far as anything appears on the exhibitor's records is concerned, there is no way of telling, is there, what part of those admissions are actually attributable to the top feature as distinguished from the bottom feature?

A. Well, since the contract is made in advance of the play date and the second feature is flat, it takes no portion of the box office other than the stipulated flat price in advance.

Q. But I am saying if you wanted to find out from any records that are available how much or what part of the admissions that were paid to see any of these programs were attributable to the top feature as against what is attributable to the bottom, there is no record you could look at that would give you the answer, is there? A. No, sir.

Q. Now, the figures that Mr. Gillespie put together here show features over $500,000, 19 pictures there.

523 As I understood your testimony, Red Shoes is actually included there twice; is that right? A. That's correct.

Q. Once when it was roadshown, when it had no subsequent run; is that correct? A. That's right.

Q. And then later when it came back in general release when it did play the circuit on some subsequent run; is that correct? A. Yes.

The Court: Why is there a difference in that case between a roadshow and a first showing, except that the roadshow is a longer period of time? Red Shoes played at the Bijou for a long period of time. Isn't that the same as a first run, really?

The Witness: Generally, if I may interrupt, after a roadshow there is a period of time when it is not shown anywhere in the country, and then it is brought back again and released generally. It is done with the large pictures usually.

By Mr. Wright:

Q. In that respect, I take it, Mr. Gross, it is no different than a reissue, that is, if you have a picture which is

524 exhibited first run in one year and then reissued and put through the release in another year, you treat that as two pictures; is that correct? A. Well, it is not actually a reissue in that it generally plays a specific

house in each town, but then it comes back again. Presumably, those people who saw it the first time at the roadshow have the opportunity again to see it as a reissue.

Q. The only analogy with the reissue, I suggest in each case there is a substantial lapse of time between the roadshow and the regular first-run release; isn't that so? A. That's correct. It is a matter of time.

Q. If you took out of your computation there the Red Shoes roadshow so you would have just the 18 pictures, then what would that percentage ratio be that appears on Mr. Gillespie's Exhibit B as 6.7? A. I haven't done that with respect to those 19 pictures. I have only made a calculation with respect to the 196, if you eliminate the roadshow, not with respect to those 19.

Q. Would it lower that ratio or increase it, can you tell us that? A. Well, if I eliminated the roadshow where you have no metropolitan subsequent-run figure, whereas
525 I do have a national, I would be making the national figure smaller and the ratio larger to whatever extent it would be.

I have done it on the 196 but not on the 19.

Q. On the 196 what is the effect?

The Court: Of what? I do not follow you.

Mr. Wright: Eliminating the Red Shoes roadshow.

The Court: From what?

Mr. Wright: From the 196 pictures. A. We have 196 pictures——

Q. You have a total ratio shown there of 6.4 for the 196 Eagle Lion films.

The Court: What did you take in on the 196? Did you take in Red Shoes at all?

The Witness: Red Shoes was in completely, both roadshow and regular release.

The Court: Both ways?

The Witness: Yes.

The Court: Why isn't that right?

Mr. Wright: I think it probably is.

The Court: What are we trying to alter the ratio for?

Mr. Wright: I thought there was some suggestion
526 that because it had been a roadshow, that the roadshow was improperly included.

By Mr. Wright:

Q. Mr. Gillespie in setting these up in brackets here arrives at Loew's Exhibit B at substantially different percentages than you would have if you followed through his final classification of over $500,000 and then just took the films over $400,000, over $300,000, over $200,00, over $100,000; is that correct?

The Court: What is the question?

Q. Just tell us——

The Court: Do you want to strike the rest out? You made a long speech.

Mr. Wright: I will strike the question.

Q. Just tell us what the ratios are for all of the pictures that Eagle Lion had over $400,000.

The Court: Ratio as to what?

Mr. Wright: The ratios that are shown on Mr. Gillespie's schedule here.

The Court: It must be a ratio of something to something else.

Q. What I am asking you is the ratio, the aggre-
527 gate New York metropolitan rental less first run to the aggregate national rental less New York metropolitan plus the New York first run for the pictures of Eagle Lion and computed the same ratio, what would the Eagle Lion ratio be? A. The Eagle Lion ratio is 6.6.

Q. And then what is the comparable ratio for the pictures of the eight distributors which also had national rental of more than $400,000? A. There were 66 over $400,000, and their ratio was 9.1.

Q. And then if you took the pictures over $300,000 of Eagle Lion and computed the same ratio what would the Eagle Lion ratio be? A. The Eagle Lion ratio is 6.6.

Q. And for the eight distributors' films over $300,000, what would their ratio be? A. 9.1.

Q. And then if you did the same thing with respect to the pictures of Eagle Lion that grossed over $200,000, what would the ratio be? A 6.6 for Eagle Lion.

Q. And for the eight distributors it would be what? A. 9.0.

528 Q. And then if you did the same thing for the pictures over $100,000 for Eagle Lion, what would the ratio be? A. 6.4.

Q. And then the corresponding ratio for the eight distributors would be what? A. 9.0.

Q. In response to a question raised by his Honor, have you also got a schedule there that would show you what the effect of this Eagle Lion ratio we have been talking about would be of excluding its reissues? A. Yes, I have.

Q. And what would that ratio show? A. The ratio of all the pictures is 6.4, and if we exclude the reissue in that Eagle Lion program, the ratio is 6.3.

Q. And then what would be the effect on the ratio of excluding all of the westerns? A. Instead of 6.4, it would be 6.8.

Q. What would be the effect if you excluded both the reissues and the westerns? A. It would be 6.7 instead of 6.4.

Q. And if you excluded the foreign-made pictures
529 that Eagle Lion distributed, what would that effect be on the ratio? A. The ratio would be 5.9 instead of 6.4.

Q. And then if you excluded from the Eagle Lion releases all of the reissue westerns and foreign pictures, what would the Eagle Lion ratio be? A. 6.2 instead of 6.4.

Mr. Wright: I think that is all.

Recross-examination by Mr. Raftery:

Q. On this last exclusion, on the foreign, the principal exclusion would be Red Shoes, both roadshow and general release; isn't that a fact? A. That's correct.

Q. So if you take out the biggest grossing picture you have, you have reduced the 6.4 to a lower figure? A. 6.2.

Q. Now on these uppances that you gave Mr. Wright on above 4 and above 3 and above 2 and above 1, aren't all those uppances caused mathematically by including in from the eight distributors the pictures that grossed in excess of $1,630,000? Is that what pushes up the average? A. Pushes up our average?

530 Q. No, the average from Mr. Gillespie's exhibit.

A. Well, the best way to answer you is with figures, I presume.

Q. Yes. A. On the other companies, if you eliminate all the pictures—take all the pictures, the ratio is 8.9 If you eliminate the pictures under $100,000 the ratio is 9.0. If you eliminate those under $200,000 the answer is 9.0. If you eliminate those under $300,000 the ratio is 9.1. If you eliminate those under $400,000 the ratio is 9.1. If you eliminate those under $500,000 the ratio is 9.2; and if you stay with the million-dollar pictures, the ratio is 9.3.

Is that the answer you want?

Q. No. A. I am sorry.

Q. Mr. Wright took Mr. Gillespie's exhibit and he asked you to give percentages on the pictures released by the eight majors, as he has been calling them, that grossed above $400,000.

Didn't you include in those figures all those top-grossing pictures that grossed in excess of $1.6 million?

531 A. Yes, all pictures that grossed over $400,000.

Q. Right. Now what brings up that average, that figure, that percentage that you gave Mr. Wright, are the big number of high-grossing pictures that were released and distributed nationally by those eight companies and were included in your calculations? A. Yes. The largest amount of film rental was earned by the largest picture.

Q. That's correct. And that is what increased these figures that Mr. Wright asked you about on above 4, above 3,

above 2 and above 1? A. I don't know what you mean by "what increased these figures."

Q. On this chart of Mr. Gillespie's, when you are comparing pictures that grossed under $100,000 you had 97 pictures of Eagle Lion that grossed under $100,000; is that correct? A. That's correct.

Q. And you have seven of the 96 that grossed under $100,000 that were distributed by the eight distributors originally defendants in this action; right? A. Seven right.

532 Q. When you are comparing 97 and 7, as his Honor remarked this morning, you are really comparing apples with apples, aren't you? A. No. I took a ratio of 97. It is somewhat similar to an average. I am talking about the average performance of a 97, the average performance of a 7, and they are both pictures.

Q. And they both nationally grossed under $100,000? A. That's correct.

Q. And when you took the 51 as against the 10, you are comparing the same class of merchandise, that is, pictures of both sides which grossed under $100,000; isn't that the fact? A. No. The fact is in that second line we are comparing pictures of Eagle Lion that grossed between $100,000 and $200,000——

Q. And the same applies to the 10? A. That's correct.

Q. Merchandise in the same grossing character; isn't that right? A. Their national rentals were of the same order, yes.

Q. And the same applies to the $200,000-$300,000; 10 Eagle Lion, 7 of the eight distributors? A. Yes.

533 Q. That is comparing apples with apples, as his Honor remarked this morning? A. Was it apples and apples or apples and oranges?

Q. We will come to the apples and oranges next.

But these were in the same class of merchandise; right? A. They have the same range of national film rental. That is all I can say about it.

Q. And the same here on the 16 as against the 6? A. That's correct.

Q. And the same on the 3 against the 5? A. Yes.

Q. When you were preparing them with Mr. Wright and you increased these figures over here, these ratio figures, you were comparing all the merchandise included in the 61 over $500,000 up to $5 million, and the merchandise included in each of the categories above the subtotal lines; isn't that a fact? A. I didn't change the ratios. We took a different group of pictures.

Q. In other words, if you put in these 61 pictures, and particularly the pictures that grossed in excess
534 of $1,630,000, you are bound to increase each of the percentage figures contained in the column "Ratio 4 to 3"; isn't that a fact?

The Court: I think that is obvious.

A. There is no way to change these ratios. If he wants to regroup them——

Q. By the way, Canon City, you listed that as a top feature and Raw Deal as a second feature in response to a question? A. Yes.

Q. Isn't it a fact that those two Eagle Lion pictures played as part of one twin bill over the RKO circuit? A. They played together as a double bill, and my records indicate that Canon City played on a percentage and Raw Deal was a second feature flat.

Q. You, as the distributor, could have allocated either one to the flat or the percentage because you owned both pictures; isn't that a fact? A. We could allocate internally as we saw fit, but I don't know about the contracts, whether they read that way.

Q. I show you a document dated August 8, 1950, and I ask you if that is a license exhibition agreement
535 for the exhibition of two Eagle Lion pictures in the RKO theatres (handing). A. That is not these two pictures

Q. No, it is another pair that played simultaneously and together. A. That's right.

Q. And those two pictures were what? A. The Jackie Robinson Story and The Story of GI Joe.

Q. And those two pictures were sold on one contract to RKO for specific play date—that would be Labor Day weekend in 1950—at each of the theatres—and how many theatres—34 theatres in the metropolitan area neighborhood first-run; right? A. That is what the contract says. It speaks for itself.

Q. And what was RKO obligated to pay for those two pictures under the contract? A. Under the contract, as I have it here, it is 25 percent of the combination.

Q. And you could allocate it any way you wanted? A. We had to allocate it some way.

Q. You could tell RKO, "We want you to report a percentage on Robinson and we want a flat on GI IJoe;
536 could you not? A. I don't know that.

Q. You could do that? A. I don't know whether we could or not.

Q. Hasn't there been some testimony that Robinson was played as a first feature, top half, and GI Joe as the second feature, on a flat? A. Yes, we allocated that in our own records.

The Court: That was your own record that allocated it that way?

The Witness: That's right. We got the money and allocated it as we saw fit, I presume.

By Mr. Raftery:

Q. And that may have happened on many of the pictures that played? A. On many that played long half?

Q. Yes. A. As a combination?

Q. As a combination. A. There weren't very many that played as a combination.

Mr. Raftery: We will come to that.

The Court: Any further questions?

Mr. Raftery: No further questions.

536a The Court: Anything further, Mr. Gillespie?

Mr. Gillespie: No further questions.

The Court: You are excused.

(Witness excused)

The Court: Next witness.

Mr. McGovern: We would like to call Mr. Leon Kaplan as our next witness.

537 **Leon Kaplan**

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. McGovern:

Q. Mr. Kaplan, would you state your address and occupation, please. A. I am an attorney. My residence address is 739 Homley Avenue, Los Angeles, California.

Q. Are you presently associated with the plaintiffs in this lawsuit, Chesapeake Industries and its subsidiaries, in any way? A. Yes.

Q. In what respect? A. I am California counsel in certain matters.

Q. For Chesapeake Industries? A. Yes.

Q. Would you detail for the record, Mr. Kaplan, your association with the plaintiffs here over the period of time that you have been associated with them. A. The plaintiff Eagle Lion or just——

Q. Go back to the days of the PRC Company and trace it down through the Eagle Lion companies. A. My firm was

California counsel for Pathe Industries since April,

538 1940, continuing until the present time.

We were California counsel for the various PRC companies, that is, PRC Pictures and PRC Productions, from about 1941 until those companies became inactive.

And we were California counsel for Eagle Lion, from its inception, and until Eagle Lion Classics was sold to United Artists.

Q. Did you at some point actually assume responsibility for the negotiation of contracts with independent producers on behalf of Eagle Lion companies? A. Yes.

Q. At what time was that, Mr. Kaplan? A. September of 1949.

Q. Mr. MacMillen has already testified, Mr. Kaplan, that he had some connection with the negotiation of contracts with independent producers. Would you detail for the record precisely what your relationship was in terms of Mr. MacMillen's relationship to those independent producers. A. Independent producers who desired or were interested in discussing arrangements with Eagle Lion Films for the production or release of pictures through Eagle Lion contacted me, if they were in California, contacted
539 Mr. MacMillen, if they felt so disposed, or if they were in New York. I mean, there were no firm channels. Producers could contact whom they desired.

I conducted negotiations to a point and then reported to Mr. MacMillen and followed through based on his instructions.

Q. That would be with these producers who were negotiating on the West Coast? A. Yes. Those who took matters up with me, if I felt, on a preliminary examination, the company would not be interested or the producers didn't have that which they represented, I terminated the negotiations; but any negotiations that looked interesting, I reported to Mr. McMillen and then from that point on followed his instructions, but actually conducted the face-to-face negotiations with the producers at the studio.

Q. Can you estimate approximately how many independent producers you negotiated with on behalf of plaintiffs from that period in, as I understand, late summer, 1949, when you assumed responsibility for such negotiations? A. I would say in the area of 50.

Q. Am I clear that would be in the period between,
540 let us say, August or September, 1949 down to the sale to United Artists? A. Yes, in April, 1951.

Q. Of those 50 or so producers with whom you negotiated, how many such producers finally gave Eagle Lion a contract to distribute their pictures? A. As best I can recall, it is between 15 and 20 different producers, covering a slightly larger number of pictures. Some cases we got two or three pictures from one producer.

Q. Will you tell us, Mr. Kaplan, in these negotiations with these producers, what objections, if any, did the producers advance to distributing through the Eagle Lion companies?

Mr. Raftery: I object.

The Court: Objection sustained. You have to pinpoint it more than that. You have to get a particular man or a particular individual.

Mr. McGovern: All right.

Q. Mr. Kaplan, in these negotiations with the independent producers, would you describe one such negotiation so we can get an idea how the discussions went on both sides, for Eagle Lion and the producer.

Mr. Raftery: I object.

The Court: Name a particular instance.

541 Q. Can you give us the name of some producer?

Mr. Raftery: Your Honor, I wish to press the objection that it is hearsay. What some other person told this man, we have no opportunity to cross-examine.

The Court: This man was representing one of the parties and he is detailing the problem he had in negotiating a contract for them.

Mr. Raftery: Yes, a contract for the distribution of a picture.

The Court: He can say what he said to the man and he can give the objections the man gave to it. Whether or not that is conclusive proof that the objection is good is another matter, but I should think he certainly can testify about the negotiations, provided he does it specifically and doesn't do it with just a broad brush.

Mr. Raftery: We are deprived of our right to cross-examine this man he was talking to. Here is an attorney

representing a company talking to a third party, and he is going to testify to what a third party said without our having any opportunity to cross-examine. That is the point of my objection.

542 The Court: I can see your point. I will let it come in.

Q. Would you give us the names of some of these independent producers with whom you negotiated? A. I can. Shall I start with those with whom deals fell through or those with whom deals were consummated?

Q. Whichever way you wish. Just give us the names of some independent producers with whom you did negotiate and with whom you had these discussions. A. I recall a discussion with a Mr. Edward A. Alperson, who is an independent producer in Hollywood, which took place shortly after I started the function of negotiating independent contracts, and the negotiation took place with Mr. Alperson personally at the studio.

Q. Was that negotiation about any particular picture, Mr. Kaplan, or was it about some picture to be produced or precisely what it was? A. Mr. Alperson contacted me to discuss generally the terms upon which Eagle Lion would be interested in financing and distributing a group of pictures which he would produce, he or his company would produce and own. We didn't discuss any specific, what we term, packages because the negotiations broke up on fundamental points before we could get down to——

543 The Court: I don't think that is particularly material. This is a negotiation for both production and distribution.

Mr. Raftery: That is right.

The Witness: Production by Mr. Alperson, distribution by Eagle Lion.

The Court: You said he was looking for some financial contribution by you to the production, didn't you?

The Witness: Yes.

The Court: Up to that point, that doesn't enter into this case at all.

Mr. McGovern: I would like to explore it just a bit.

Q. Let me ask you, Mr. Kaplan, in some case, when you were negotiating a distribution contract with a producer, did you, as part of your distribution contract deal undertake to finance the producer in any way, shape or form? A. Eagle Lion, in most instances, was required to procure all or a part of the financing in order to get the contract for the distribution of the picture.

Q. Is that what you are suggesting occurred in this
544 negotiation with this person Alperson? A. If I may state what he told me, to begin with——

The Court: You did'nt make a deal with him, is that it?

The Witness: No; it foundered because of the problem of his feelings about the strength of the Eagle Lion distribution strength and particularly——

The Court: Didn't go through, all right.

Q. Can you tell us who Mr. Alperson is. A. Mr. Alperson had a long and varied career in the motion picture industry. He was one of the chief executives of Fox Theatres. He was president of the film producing and distribution company called Grand National Pictures. I believe he was chief film buyer for RKO and——

Q. This, I take it, was at sometime in the past prior to your discussion? A. These were all prior to the—but at the time he came to us he was an independent producer, producing a group of pictures for distribution by Twentieth Century-Fox.

Q. Will you tell us why your discussions with Mr. Alperson fell through? A. He told me that he was familiar
545 with Eagle Lion's distribution and that because of Eagle Lion's inability to obtain the proper revenues from the circuits and to even place the pictures in the circuits, except a few pictures which were of unusual strength, he would be unwilling to produce pictures for

Eagle Lion distribution unless Eagle Lion financed the pictures completely and guaranteed him a profit.

The Court: Did he send for you and ask you to come so that he might discuss Eagle Lion distribution?

The Witness: I had known Mr. Alperson quite well. I had been the attorney for Grand National Pictures when he was president of the company.

The Court: He sent for you, though? You didn't go to him and try to sell him Eagle Lion?

The Witness: He initiated it by calling me, and we met once at my office, studio, and once I went to his office.

The Court: He sent for you, knowing that Eagle Lion didn't have a good distribution system?

The Witness: Yes, but he wanted us to guarantee the financing and a profit.

Q. In these discussions with Mr. Alperson what circuits did he mention in particular, if any? A. He men-
546 tioned New York, and he mentioned the Fox West Coast Circuit and Los Angeles.

Q. Did you have negotiations with any other producers in which the question of Eagle Lion's access to the circuits came up, that you can recall? A. Yes.

Q. Would you mention another one such producer. A. We dealt with a producer by the name of Frank Melford, who had a company called Ventura Pictures, with whom we made a contract for two pictures.

Q. Can you recall the names of those pictures today, Mr. Kaplan? A. Yes. The first picture was called Boy From Indiana. The second was called Rogue River.

Mr. Raftery: What river?

The Witness: Rogue River.

Q. R-o-g-u-e? A. R-o-g-u-e. That is the name of a river in Oregon.

The Court: Were they produced?

The Witness: Yes, they were produced and delivered to Eagle Lion and released by it.

Q. Will you indicate what if anything the circuits had to

do with your negotiations with Mr. Melford. A. When
547 Mr. Melford started his negotiations with me for—
with respect to these two projects, he endeavored to get the best terms he could for himself, and in the course of the negotiations stated that he felt he was entitled to better terms than he could get from one of the major companies because of Eagle Lion's weakness in distributing the pictures in the circuits, and in particular the distribution in New York, and he insisted on a number of concessions in connection with this contract, some of which we finally gave in order to make the deal.

Q. What were those concessions to which you have referred? A. We agreed to supply what is called a completion bond, that is to say, if the cost of the pictures exceeded the amount for which they were budgeted, Eagle Lion agreed to advance the excess cost.

The Court: That was on the production of the movies?

The Witness: That is right.

The Court: Not the distribution.

The Witness: In distribution we agreed to waive our right to distribute the pictures in foreign countries and
confine distribution to the domestic territory, and we,
548 what we called, deferred part of the domestic distribution fee. In other words, Ventura agreed to pay for the normal distribution fee but part of the—collection of part of it was held in abeyance until he recovered his cost.

Q. Do you know whether or not with regard to those particular pictures that portion of the distribution fee that was deferred was ever recouped by Eagle Lion? A. In those pictures, it was.

The Court: What were those pictures?

The Witness: Boy From Indiana and Rogue River.

Mr. McGovern: May I interrupt, your Honor, to ask Mr. Gross whether they are on the schedule?

Mr. Gillespie: I think Boy From Indiana is on Plaintiffs' Exhibit 11, next to the last page, near the bottom.

The Court: Yes, I saw that.

Mr. Gillespie: I couldn't find the other one.

The Court: That is what I was looking for.

Mr. Gross: Rogue River was released in the year after, '51 year. It is not included.

Mr. McGovern: In the next season.

549 The Court: Therefore it wasn't included in that schedule at all.

Mr. McGovern: Not included in this list.

The Witness: I think it came in and was substantially handled by United Artists after United Artists took over.

By Mr. McGovern:

Q. In other words, Rogue River achieved its principal distribution from United Artists after they purchased the stock from Eagle Lion? A. I believe so.

Q. Can you, Mr. Kaplan, name any other producer with whom you had discussions relating to distribution by Eagle Lion in which the question of access to these circuits played some part in your negotiations? A. We had dealings with a producer by the same of James S. Burkett over a picture called Sunken Treasure, which I don't think was ever produced, although a contract was made for its distribution by Eagle Lion.

He was a man who had formerly been in distribution and had operated his own sales exchange and had also acted as a sales representative for a man by the name of Jack Schwarz.

550 Q. Will you spell that? A. S-c-h-w-a-r-z, who was releasing a large number of low-budget pictures through PRC and Eagle Lion. And in connection with his activities as sales manager for Schwarz, he had spent about six months traveling about the country and visiting all the Eagle Lion exchanges. And when he was negotiating for his own pictures, he said that his investigation had indicated to him that Eagle Lion was woefully weak in its—both in its ability to secure proper circuit bookings and in

the speed of liquidation of contracts with circuits and——

Q. Would you tell us, if you know, what that term means, speed of liquidation. A. The pictures didn't play off as quickly after they were ready for distribution as the pictures of the major companies.

The Court: Was that true or was it not true, do you know?

The Witness: I don't know.

The Court: What we are getting here is a lot of bargaining talk of somebody who is trying to make a better deal for himself. Anybody who has been in business knows, when you are negotiating, another man will tell you all
551 your weaknesses and you will tell all your strength, and it isn't necessarily any proof that the weakness is correct or the strength is correct, and I think you have to take all that bargaining talk with a grain of salt both ways.

The Witness: I mentioned Mr. Burkett specifically because he predicated his statements based on his personal observations on this tour.

The Court: That is hearsay.

Mr. McGovern: Your Honor, may I, in that connection, merely raise one aspect of this case. This is, of course, an antitrust case and is a conspiracy case. I would like to suggest that there is a peculiar rule that operates with regard to the type of testimony we are now trying to elicit here. In cases of this type the question is, really, not whether any of the persons he talked to knew there was a conspiracy or not. That is not the problem. The question is whether or not they had the impression that if they dealt with Eagle Lion that Eagle Lion would not be able to get access to the circuits in New York, and, secondly, what impact that had on the negotiations. They might, of course, have been quite wrong, in fact.

The Court: But your proof has to be, in fact, it
552 would have had an effect upon them, and then you can go on and show what the impression was.

Here is this man who was interested in distributing a Boy From Indiana, which I see, from Exhibit 11, grossed nationally $196,800. It grossed more in the New York metropolitan area than it grossed in Chicago.

And I am going to ask the witness: Is that the kind of picture he thought he could distribute through other distributors or was he coming to you because he knew you distributed that kind of picture?

The Witness: I am not sure whether he thought he could get a contract for that kind of picture with one of the major companies, but I am sure he thought he could get a contract, if not there, with Republic or Monogram, with whom he had previously done business.

Mr. McGovern: Well, the significant figure, I think, Judge Dawson, that you have on that chart, is that the Boy From Indiana, while it grossed $196,000 only took $6,300 out of the New York metropolitan area, and I am suggesting, sir—I agree that nobody who gives any hearsay impression of what happened some place else can prove what is actually the case in New York—but I am suggesting this, sir, that if we prove, as I think we have, that there is
553 a conspiracy operating in this New York area by the two circuits to deny an independent producer, not necessarily Eagle Lion, of course, they didn't single it out for peculiar treatment, but any independent producer, reasonable, honest fair access to the circuit, if we prove that fact, I suggest the question of damage to us does fall within what I am describing as the exception to the hearsay rule.

In that connection, your Honor, I would like to call your attention specifically to a case on this very point, American Cooperative Serum Association v. Anchor Serum, 153 Fed. (2d) at 907, and reading, Judge Dawson, from 912, the Court says:

> "The defendants contend that the court erred in permitting plaintiff's witnesses to testify as to the reasons given to the plaintiffs by their druggists why the

latter could not sell the plaintiff's serum at 75 cents, which resulted in the plaintiff's reduction in price. They urge that such evidence is hearsay, self-serving and thus incompetent. This was not error. Such evidence is an exception to the hearsay rule and is well recognized,"

and they cite Lowe v. Lawlor and more particularly
554 the New York Live Poultry case, which is an old case in this circuit, in which Judge Swan wrote the decision, in which he held, in a conspiracy case, this type of information is well nigh often the only type of testimony you can possibly have.

So that whether producers who talked to Mr. Kaplan when he was negotiating those contracts themselves knew there was a conspiracy is immaterial. The question is, if we prove a conspiracy here, what is the impact of that on our negotiations with independent producers.

The Court: I understand that and that is why I have allowed some of it.

Mr. McGovern: I appreciate that.

The Court: I recognize some of it is only bargaining talk. Therefore, you must discount it as such.

Mr. McGovern: Yes, indeed. No question about that.

The Court: I think at this point we will take our afternoon recess of ten minutes.

(Short recess.)

By Mr. McGovern:

Q. Mr. Kaplan, will you name any other producers
555 with whom you had negotiations in which the question of access to these New York circuits came into the discussions. A. I conducted some negotiations with a producer by the name of Sam Spiegel, and a part of those negotiations Mr. MacMillen participated in.

Q. What was the result of those negotiations? A. We discussed distribution agreements for two projects which

Mr. Spiegel had. One was called When I Grow Up and the other was called African Queen.

After a number of meetings, he agreed to give Eagle Lion a distribution agreement on When I Grow Up, but refused to give one with African Queen, which was the one we were really interested in, stating that he couldn't entrust that important a picture to Eagle Lion because of, not only its weakness with the circuits, but even if they got into the circuits, he felt they wouldn't get the maximum terms which the picture would be entitled to and wouldn't play off fast enough for him.

Q. What actually happened with regard to the African Queen, if you know? A. I do know. That ultimately went to United Artists. When I Grow Up was pro-
556 duced and delivered to Eagle Lion.

Q. What did African Queen do as a national gross, do you know? A. Oh, approximately $4,000,000.

Q. Were there any other producers with whom you had discussions?

The Court: When I Grow Up, how much did that produce?

The Witness: I know it resulted in a substantial loss. I don't recall the gross on it but it was quite small.

Q. These two negotiations you have just referred to with regard to When I Grow Up and African Queen occurred about when? Can you fix the time for us? A. It extended over a period of months and my recollection is that we concluded the agreement in November of 1950, and started them three or four months prior to that time.

557 Q. Would you refer to any other producer with whom you had discussions relating to distribution by Eagle Lion in which the question of access to the New York circuits came up. A. I had extensive negotiations with a producer by the name of Howard Welch and an associate of his by the name of Joseph Seidelman, covering a group of four to six pictures, rather expensive pictures,

scheduled to cost in the neighborhood of a million dollars apiece.

The deal progressed to a point where I called Mr. MacMillen in from New York, and he sat in on about a week of negotiations, and Mr. Seidelman had been an executive with Universal and finally told us that he had concluded that the Eagle Lion distribution strength was not sufficient, that we were too weak with the circuits, and these pictures required very important circuit treatment, and I know the first two of those pictures ended up at Warner Bros. and I don't know what happened to the balance of the program.

Q. Were there any other producers with whom you had such discussions? A. I remember one with a producer by the name of Sam Boerwitz. His son was a lawyer
558 in my office, so I happen to recall that one.

No deal resulted from those negotiations, but he was a nephew or a cousin of Joseph Schenck and Nicholas Schenck and told me that he had discussed Eagle Lion——

The Court: I am not going to take hearsay as far as that. A. It was along the same lines. He said that he felt that due to the——

The Court: Mr. Boerwitz told you this?

The Witness: Mr. Boerwitz told me that due to the poor record of Eagle Lion with the circuits and in particular the New York circuit, with which he was familiar, he would be unwilling to make pictures for Eagle Lion unless they fully financed them and paid him as part of the cost of the picture a very substantial producer fee, and the Eagle Lion policy was not to finance any producer completely, and at that point the negotiations were dropped.

Q. Can you recall any other producers who had such discussion with you, Mr. Kaplan? A. Yes. I had discussions periodically with a producer by the name of Edward Small. They didn't relate to any specific new picture
559 to be made. He already had an interest in several pictures which Eagle Lion was distributing.

Q. Will you name some of those pictures for us, Mr. Kaplan. A. T-Men and Raw Deal.

Q. Those are two of the pictures that have been mentioned here this afternoon in the examination of Mr. Gross? A. I heard their names mentioned, yes. I think those are the only two, if I am not mistaken. Periodically we sounded Mr. Small out to see if he would like to make some more pictures, and he declined, stating that he felt that he could do better with United Artists or one of the other companies because he did not think we were extracting the maximum revenue from the circuits.

By the Court:

Q. Did he make them with the others? A. He made a large program of pictures with United Artists.

By Mr. McGovern:

Q. Any other producer you can think of, Mr. Kaplan?

A. I had some talks with a producer by the name
560 of Walter Wanger. Prior to the time I started negotiating independent production agreements for Eagle Lion, Eagle Lion had made a contract with Wanger and financed, I think, two pictures of his.

Q. Can you name those pictures for us, Mr. Kaplan? A. Tulsa—I am trying to think of the other one. I can't think of it for the moment.

Q. Go ahead with your discussion.

The Court: Did the City of Tulsa help to finance that, too, or the Chamber of Commerce down there?

The Witness: Unfortunately not.

A. And Mr. Wanger came in periodically when he got reports from the New York accounting office of Eagle Lion and complained about the fact that in his opinion the pictures were not getting the revenue which their quality entitled them to and complained in particular that the liquidation of the pictures was unduly slow and he had a number of pictures then in release by Universal and he

compared the reports on the various pictures to show how poorly Eagle Lion was doing and, in particular, in the large cities where the circuits were important, and
561 told me on the basis of that record he was not interested in doing further business

Q. In other words, the complaints from Mr. Wanger were with reference to pictures that you had obtained from him and which were then in the course of distribution? A. Yes.

Q. Are there any other producers that you can now recall with whom you had such discussions? A. I think it may have been mentioned casually. Those are the only ones that stand out as an important facet in the negotiations.

Q. Mr. MacMillen, when he was on the stand, mentioned Rathvon. Were those negotiations handled with Mr. MacMillen, do you know, or did you have any part in them? A. I did not participate in that negotiation.

Mr. McGovern: That is all, your Honor.

Cross-examination by Mr. Raftery:

Q. You mentioned African Queen. African Queen was distributed by United Artists; isn't that a fact? A. Yes.

Q. And United Artists is an independent distributor, distributing only independently-produced pictures;
562 isn't that a fact? A. It certainly was at that time. I think today——

Q. We are talking 1946 to 1950, in the period you are talking about. A. That's correct.

Q. And United Artists had no interest of any kind or character in either RKO theatres or Loew theatres; isn't that a fact? A. As far as I know that is correct.

Q. And United Artists was able to get distribution of the picture African Queen so that you say it produced a $4 million gross; is that what I understood? A. Yes, sir.

Q. You mentioned Alperson. You have known Eddie Alperson a long time; isn't that a fact? A. I have known him since 1935.

Q. When he formed the Grand National? A. Yes.

Q. That was a distributing company? A. Yes, sir.

Q. And they had a studio? A. Correct.

Q. And the studio that they had later became the
563 Eagle Lion studio; isn't that a fact? A. That's correct.

Q. And the Grand National lasted how long? A. Four years.

Q. And how many pictures did they release, if you remember? A. I would guess 60.

Q. In the whole period? A. 60 to 75, yes.

Q. And they folded; isn't that a fact? A. They certainly did.

Q. And this Burkett you mentioned, he is Alperson's brother-in-law, isn't he? A. No.

Q. Isn't he some relative? A. You are thinking of Philip Krasne.

Q. He is the fellow I was thinking about, Krasne.

Burkett, did he ever produce anything besides this Boy From Indiana? A. Yes. He produced eight or ten Charlie Chan pictures at Monogram.

Q. Low-bracket pictures? A. Yes. And another dozen pictures, but all low-bracket.

564 Q. All low-bracket? A. Yes, sir.

Q. And Melford was a low-bracket producer at Monogram? A. Yes—Well, he was associated for a number of years with Sol Lesser, and he has produced some pictures in the half-million dollar category.

Q. But most of the pictures and the pictures you were discussing with him were low-bracket pictures; is that correct? A. That's correct.

Q. The circuit weakness of Eagle Lion, you mentioned they were weak out on the West Coast in Fox West Coast? A. Yes.

Q. And they were weak in Chicago? A. Yes.

Q. And they had the same weakness all over the country that they had in New York as far as circuits; is that your

testimony? A. The producers either referred generally to weakness in the circuits or from time to time pointed out New York, Fox West Coast, Balaban & Katz, Schine, two or three others.

565 Q. How about Crescent Amusement Company? A. Most of them didn't have that intimate a knowledge of all the circuits in the country, but they pinpointed the big ones.

Q. How about Texas, Interstate? A. Bryan Foy was the head of Eagle Lion for a number of years, and I think O'Donnell was his brother-in-law. So they didn't seem to pick on him.

Q. You mean O'Donnell's brother-in-law was married to Bryan's sister; is that what you are trying to tell us? A. That's right.

Q. But the Eagle Lion distribution was generally considered weak, you say, by all these people whom you tried to make deals with; is that a fact? A. In the circuits.

Q. In the circuits. It could have been New York, it could have been Boston, it could have been anywhere? A. They didn't limit it to New York.

Q. They did not limit it. So, as far as you know, the Eagle Lion pictures got the same treatment all over the country that they got in New York; is that right? A. I had no knowledge either way.

566 Q. Well, that is what these fellows told you? A. Yes, they said that Eagle Lion did not get the treatment that the pictures deserved or liquidation in the circuits.

By the Court:

Q. What do you mean, "in the circuits"? A. Most of the time they just used the term grandly and without pinpointing it, but then some of them, such as Alperson, put his finger on the Loew and RKO circuits in New York, the Fox West Coast in Los Angeles, Balaban & Katz in Chicago, and the Schine circuit, I think he said, in upstate New York.

By Mr. Raftery:

Q. And in effect they claimed that because of the character generally of the pictures that were distributed by Eagle Lion, that those pictures could not secure playoff in the big, fine theatres of Fox West Coast or whoever it happened to be running the theatres in that particular area; isn't that the fact? A. Not exactly. Alperson said that the eight major companies had established precedents for prices and times of playoff with the circuits that neither Eagle Lion nor any other independent had, and therefore the
567 pictures of Eagle Lion, unless the picture had unusual strength so it could stand on its own feet, did not get as good a treatment because of the lack of precedent that the pictures of the eight majors got.

Q. In other words, if a picture could not stand on its own in these theatres in the large cities or in the circuits, as you call them, Eagle Lion could not get that other picture played off but only those pictures that had the ability to stand on their own; isn't that a fact? A. If it didn't have unusual merit of its own so that the circuits would make an exception, it did not get the kind of treatment that comparable pictures of the majors would get.

Q. Now you mentioned a man named Wanger. Is that Walter Wanger? A. Yes.

Q. And Walter Wanger, you say, would come in to you and complain, and he would bring with him his Universal records? A. Yes.

Q. And would complain that he did not get as good a deal from Eagle Lion as he was able to get on playoff and what not with Universal on the old pictures; is that
568 the fact? A. He said the Universal pictures were doing better comparatively than the Eagle Lion pictures.

Q. Don't you know as a fact that Walter Wanger sued Universal, claiming they had not secured for him the playoff he thought his pictures should get? Do you know that?

A. I read that he filed a suit. I don't know anything about the merits of it.

Mr. Raftery: That is all.

Cross-examination by Mr. Gillespie:

Q. Did you say that African Queen went to United Artists, Mr. Kaplan? A. Yes, it did.

Mr. Gillespie: I have no other questions, but I would like to ask for a concession from the plaintiffs.

As I understand it, on your computations arriving at this ratio, this ratio of .089 for the eight distributors, for United Artists or, rather, Universal, the ratio is .066 for the four years, and that United Artists is .065. It that correct, Mr. Wright or Mr. McGovern?

Mr. Wright: Ask Mr. Gross.

The Court: You had better get the concession
569 from counsel since Mr. Gross is not sitting in the witness chair.

Mr. Wright: Those figures sound right.

The Court: Then subject to correction tomorrow——

Mr. Gillespie: I am quite sure I am reading from the figures supplied me.

Mr. McGovern: Is that your last question?

Mr. Gillespie: Yes.

Mr. McGovern: May I, to have the record complete, have Mr. Gross put in the rest of the figures for all the distributors?

The Court: Are you through with this witness?

Mr. McGovern: I am.

Mr. Gillespie: I am quite willing we should have just a list of them.

Mr. McGovern: We will stipulate that.

(Witness excused.)

Mr. McGovern: I would like to recall Mr. MacMillen very briefly in connection with the colloquy we had in court. I have a difference of opinion with my colleagues as to what

your Honor said and what I said, and I would like to get it straightened out.

The Court: All right.

570 **William C. MacMillen, Jr.**

recalled.

Direct examination by Mr. McGovern:

Q. Mr. MacMillen, you will recall that the application of the ratio that Mr. Gross has worked out on his chart to the gross film rentals of the Eagle Lion companies produced a figure—I believe you testified to it also—of $919,000. A. Yes.

Q. As lost film rental. And then you will recall Mr. Gross testified that on the basis of the experience that our books reflected, 45 percent of that would be retained by Eagle Lion. A. Yes, I do.

Q. And he testified to a figure of $417,000 as the amount of that lost film rental that would be retained as the amount of that lost film rental by Eagle Lion. A. Yes, I do.

Q. Now let me ask you, in your judgment whether or not the retention of that additional $417,000 would have incurred any additional expense or the part of the plaintiffs.

A. It would——

571 Mr. Raftery: That is pure speculation.

The Court: I will ask him not to speculate. He ought to know.

Mr. McGovern: I should think so. This is the chief executive officer.

The Court: Would it have resulted in any additional expense?

The Witness: No additional expense of any substance.

Q. Would you explain why you say that, Mr. MacMillen. A. Well, our selling expense, the sales would have been made, if they had been made, by the sales executives who were already in our employ.

The only additional expense that would have been in-

volved would perhaps have been some expense of getting the prints from our branch office on Ninth Street to the various theatres and back again, and, as a matter of fact, as far as being a distributor is concerned, those expenses were charged back to the producer and those expenses would have been nominal anyway, and there are no other expenses involved in serving the New York area.

572 Q. In other words, you could have serviced this additional distribution with the existing organization if you could have obtained it? A. That's right.

Mr. McGovern: That is all.

By the Court:

Q. Were any of your salesmen paid on commission? A. No, they were not.

Q. That would have been that amount before taxes of course; $400,000 more income would have resulted in more taxes? A. Yes. You can see from the figures we were not paying taxes.

Q. They are all before taxes? A. Yes.

By Mr. McGovern:

Q. In other words, it would have reduced your loss by that much? A. It would have reduced our loss.

The Court: Any further cross-examination?

Mr. Raftery: No.

The Court: You are excused.

(Witness excused)

The Court: Next witness.

573 Mr. McGovern: Your Honor, either at the close of our last informal session on Friday or one other time, I think it was agreed between counsel that the question of the assignment of the cause of action on behalf of Classics back to Chesapeake was not in issue, but I would

like to get that on the face of the record to be sure there is no misunderstanding about that.

Mr. Gillespie: There certainly is not as far as Loew's is concerned.

The Court: As far as RKO, is there any issue?

Mr. Raftery: No issue.

Mr. McGovern: Now, Judge Dawson, I thank you for your patience. I think we have come very close to the end of our case. I would appreciate very much, sir, if we could have this evening to sort of go over the transcript and see where we stand at this moment; but as the thing stands at the moment, I think I can say this is the plaintiff's case in chief. I think we have a prima facie case, but I would like to reserve that judgment, if I might, until the opening of court tomorrow.

The Court: Let me throw out some thoughts to you
574 on that. One moment you say that you were kept out of the metropolitan first run, first neighborhood run. Other moments you apparently say you did not make as much from the metropolitan first run and subsequent runs as you should have made.

Now, they are two separate things. I have the impression from the testimony that has gone in, and of course I will want to double check with the record and you may have some summary of it tomorrow, that a substantial proportion of your films actually got on the circuits in New York.

Mr. McGovern: Yes, they did. There is no question about that.

The Court: And therefore, so far as being kept off the circuits is concerned, we are concerned with particular pictures that did not get onto the circuits. In other words, they were not kept off the circuits entirely. A substantial proportion of pictures got on, some did not. If there is any particular reason why some of them did not get on the circuit that you think should have gotten on the circuit based upon this conspiracy, that is something that you might cover. If you do not wish to cover it, then we come

back to the question as to whether you got from your
575 metropolitan distribution in New York, excluding the first Broadway run, as much as you think you should have gotten, and that is what you really have been strenuously urging in this case, of course.

Mr. McGovern: That is true.

The Court: I just want to make certain which of those categories you are going to press, because under the antitrust laws it is one thing to be excluded from business in its entirety and it is another thing to be admitted to business but not on as favorable terms as you think you should have gotten.

I think you ought to cover both of them in this case.

Let me say one other thing before I finish. I say this because you may want to consider these things over night.

Mr. McGovern: I would like to, your Honor.

The Court: When you come to the question as to whether you got as high a ratio of the New York metropolitan distribution as you did for your national runs, I was somewhat impressed, I must confess, by Mr. Gillespie's exhibit that he put in, Exhibit B, which if it means what it says it means,
would indicate that the ratio that you got in the
576 metropolitan run to the national run on figures which grossed nationally less than $500,000 was a very favorable ratio, in other words, the pictures that were not particularly good pictures nationally you did a little better in New York than you did nationally.

On the pictures which grossed over $500,000 nationally, this chart would show that you did not do quite as well, let us say, as the eight distributors did on pictures over $500,000 gross nationally; but then you have the question that the aggregate national of Eagle Lion less New York metropolitan plus New York first run was only about $17 million, while for the eight distributors it was over $95 million.

Now I am not a statistician but I just wonder whether we don't have to weight these ratios, if that is the case. In

other words, if you have got the eight distributors having a ratio of 9.2 for their New York to national but included in the aggregate of the national are figures that are much higher than anything Eagle Lion got nationally, doesn't that distort that figure somewhat? I do not know whether I make myself clear, but it seems to me that you have got here 19 Eagle Lion pictures which grossed
577 nationally over $500,000 where you say you did not do as well on that kind of picture as the eight distributors would have done. It really comes down to those 19 pictures, as far as I can see. That is where you were not doing so well.

Mr. McGovern: I think not. To some extent it depends whether you start up the ladder in one direction, as Mr. Gillespie did, or start down the other end. Actually, you get a distortion down at the bottom if you use the ratio we suggested to cover all the pictures, and the extent to which those distortions all wash out, I suggest on the whole record here, is the extent to which we present a fair and reasonable picture overall.

We did have one—we put our roadshow picture in for that very purpose, so there would be no distortion about it. We put everything in. Everything is in there.

Coming back, though, to the other point, your Honor, I would just like to reiterate again briefly that as I pointed out in the opening statement we have of course three elements in the case. One is that with regard to the pictures that we actually got in the circuit itself, we did not
578 get non-discriminatory terms. Now I think the testimony that your Honor heard today indicates the very crucial importance when you play the circuit if you are lucky and you get long half, are you going to get top feature or second feature, because if you get top feature you get a percentage of the box office.

This is what the public is really paying for your picture.

The Court: I would like to see some cases where we could point it out.

Mr. McGovern: We gave you one case in the record at the conclusion of Mr. Gross's original testimony. Your Honor, let me advert to it just briefly. That is the question of the Abbott & Costello pictures.

I have never seen an Abbott & Costello in my life. I do not urge that these are great pictures and that the public has been terribly injured by not being able to see them at all, but, anyway, your Honor will recall that the RKO circuit took a picture called Buck Privates Come Home—that was a Universal picture—they played it on the circuit. They also took a picture from us but ours got played as a second feature on a flat rental of $22,500.

579 Theirs got played as a feature long half, top feature, the result of which is they took out of the circuit—and I am talking only of circuit rental—$73,600 as a percentage of rental. We took out a flat rental of $22,500.

Now I have also, I think——

The Court: Then in the national yours did better than theirs.

Mr. McGovern: Not quite. What we did say about it was that if we were going to use this silly test that Mr. Raftery had of first the Broadway house, our picture played in a first-class, first Broadway house, we took Broadway rental out, while their picture played in a second-class house and took no rental out. Still, when it comes to playing under the aegis of Universal, it takes a top position. Ours, when it comes to play finally after being held up, plays as a second feature. On circuit rentals alone they took $73,600 out; we took out $22,500. That is on circuit rentals, your Honor.

You are now, I take it, aware of how slotting works out through this. The result of that was, sir, that with regard to the whole metropolitan area we are talking about,

580 they took out $135,600 and we took out $46,000. Our national on those two pictures was approximately $1.5 million for them and $1,171,000 for us, but if you will deflate or discount that difference by virtue of the difference

they got in the circuit, the actual circuit play, you come out with them having a national gross of $1,380,000, we having a national gross of $1,125,000. In other words, the pictures were roughly comparable.

The Court: Why can't you do that with some of the other pictures?

Mr. McGovern: We can, and I think before the case is over we will.

The Court: It seems to me you have to get something here which is a practical application of your contention. If you say that you were not getting the right place or the right rental, I think you have got to show some particular instances by comparison where that actually happened because certainly from these charts it would show that on the lower-grossing pictures you were doing as well in the metropolitan area as you were nationally.

Now on those that grossed more than $500,000, it would be an interesting thing to find out where the breaking
581 point was on those. I mean what was it, what point was it that you were not doing as well in New York as you were nationally?

Do you see what I mean by that?

Mr. McGovern: Yes. I will give a good deal of thought to that.

The Court: You have got apparently 19 pictures here that grossed over $500,000 and you say it did not do as well in the metropolitan area as you should have done.

Mr. McGovern: Yes.

The Court: Now, let us take a look at those 19 pictures—I would, if I were you—and say why and compare them with some of the 16 pictures of the others.

Mr. McGovern: We will do so. As your Honor mentions that, I cannot help having flashed in my mind a silly reissue of theirs that grossed $58,000 and played long half position in the circuit. What am I going to do with such cases as that?

The Court: Let us get a circumstance where you think

a picture of yours should have gotten more with a picture of theirs which did more. I cannot see that we can necessarily take these ratios you have put in as conclusive proof of your damage at all.

582 Mr. McGovern: I am not suggesting they are conclusive, your Honor.

The Court: Or even too highly persuasive in the absence of specific cases. The reason for it is that apparently on the low-gross pictures you were doing all right. On the higher-gross pictures, according to this tabulation, according to your argument, you were not doing all right. Now, why?

Mr. McGovern: We were doing all right on the lower-grossing pictures, you say, although Mr. Gross's testimony this morning shows it was on the lower-grossing pictures that we seldom, if ever, got into the circuit. We had to sell those the hard way, your Honor, to really get out and work. We did not have a captive market to slot them down the way the defendants did.

The Court: Maybe, but you were getting a greater proportion of the national gross in New York than the majors were.

Mr. McGovern: When you put them together with the rest of it it washes out so that you come up with a figure that I suggest is a reasonable one, but let me point out that we have this one aspect of the case that I think is ex-

583 tremely important, and that is, that when we got into the circuit, as the Abbott & Costello detail shows, we did not get the same kind of terms and the major distributors did.

The Court: Let us get some cases where that is practically true.

Mr. McGovern: Do not forget the one case I have mentioned. This is a good case. Mr. Raftery brought it up and finished the story for you there.

The second category, your Honor, is this: that a good many of our pictures did not get in the circuit at all and this in categories where their pictures were getting a general play

down the circuit. The pictures that had no first Broadway run at all, for example, they got approximately 90 percent of their pictures into the circuit, whereas we were reduced to getting 25 or 30 percent in. Our figures will show this.

So you have those two elements there. You have first that with regard to the pictures we got in, we got discriminatory playing terms and discriminatory play time.

The Court: That I want some evidence on and on your other point that some of them did not get into the cir-
584 cuits. If you take these figures comparing your ratio and the other ratio, it shows that on the pictures that grossed nationally less than $500,000 whether they got in or not, you were doing better than the majors, if this exhibit is correct. That, therefore, comes down to 19 of your pictures which grossed nationally more than $500,000, and I take it they got into the circuits, didn't they?

Mr. McGovern: Your Honor, let me put it to you this way, if I may. Suppose the circuits had announced as a policy that these circuits are going to cater to the peculiar taste in New York, which they say is unique because it is one thing or the other and we are not going to exhibit any pictures that gross less than a million dollars. Suppose they said that and announced it as a policy.

Keep in mind you are dealing with an unlawful conspiracy here to start with. Suppose we did not produce a picture that grossed over $900,000. Is that to say we have not been injured, that they are entitled to set up that kind of a standard?

The Court: That is not it. On these pictures which grossed less than $500,000 nationally, apparently you did better than the eight majors did.

Now what we are concerned with, therefore,
585 is 19 of your pictures which grossed over $500,000 nationally where you say that you did not do as well in New York in proportion to the national as the defendants did or the majors did.

Well, that brings us to 19 pictures where you say you

did not get the right kind of treatment because on the other 177, on your very formula, you were doing better than the majors.

Now what happened on those 19 pictures? We have got it down to 19 pictures. Why didn't you do as well on those? Maybe that will point out what happened to you. It seems to me when you narrow it down there you have something you can talk about.

Mr. McGovern: I think it will, and I point out that even with regard to the pictures that had the lower grosses, the thing that we have to give some concern to is how much better would we have done if we could have gotten the same kind of access they were getting in the low-grossing pictures.

The Court: How much better would you? I haven't seen any proof. That is the question.

Mr. McGovern: You cannot do more than to put them in the whole pot.

The Court: You have done that and worked out the ratios, and the ratio says that you were doing better than they were on those low-gross pictures. If you are going to deal in ratios for one thing, you have got to deal in ratios for the other.

Mr. McGovern: I think that is right.

The Court: That brings you down to 19 pictures which grossed nationally over $500,000, and where you say you did not do as well in New York compared to the national as the defendants did or the majors did, let us find out why not. It seems to me that there you have something you can really talk about.

Mr. McGovern: I have in mind your thought on that.

One additional thought is the kind of expression we just got from the witness stand today which merely affirmed what Mr. MacMillen said.

That is a highly difficult area of proof, your Honor, namely, what additional distribution business would we have had had we been able to go to the producers and say,

"Look, we can give you as reasonably good service around the country as anybody else."

587 What would our business have been like if we had gotten African Queen, for example? It is well enough for Mr. Raftery to call United Artists an independent, but the testimony here shows that United Artists was admitted to the circuits pursuant to the conspiracy to divide the pie, and so they get African Queen.

The Court: But you have this problem: that here was a company that was losing money rapidly every year, not merely on distribution but on production of pictures. It was a weak company from that standpoint and not merely on distribution, apparently, judging by the statement, Plaintiffs' Exhibit 24. Maybe that has something to do also with the position.

Mr. McGovern: Let me point out to you in 1950 our distribution losses were not very substantial and it would not have taken many African Queens to put us over the hump in a grand fashion.

The Court: I do not think that you can build up liability by showing losses.

Mr. McGovern: I do not suggest for a moment you can.

The Court: If you show the losses, you have to show that they are the consequence of the illegal action.

588 Showing the losses is not proof of an illegal action.

Mr. McGovern: I agree, sir. I would much rather show you a black picture here, as attorney for the plaintiffs.

The Court: I know it would make life simpler.

We will adjourn until tomorrow morning at 10.30.

Do I understand you will not take very long tomorrow?

Mr. McGovern: I think not.

Mr. Gillespie: Your Honor, before we adjourn, I am sure Mr. Raftery and I would like to protect our record insofar as this last witness, Mr. Kaplan, was concerned.

We did not interrupt in respect of the further questions that were put to him about conversations with other persons. I think that we would like to preserve our position

on that and register our objection to that line of testimony.

The Court: All right. Your objection is overruled and an exception is granted to you.

. . . . . .

589 Mr. Wright: Mr. Gross, will you resume the stand.

Will you please mark this summary schedule Plaintiffs' Exhibit 26 for identification.

(Marked Plaintiffs' Exhibit 26 for identification.)

Norman Gross

resumed.

Direct examination by Mr. Wright:

Q. This schedule marked for identification as Plaintiffs' Exhibit 26 shows on it the figures that Mr. Gillespie had you read, the Universal and United Artists' ratios? A. That is correct.

Q. Those appear in the bottom schedule there, in the third column? A. That's correct.

590 Q. Will you just tell the Court what the schedule shows there column by column. A. This is a summary of the 96 pictures—of the 196 pictures of Eagle Lion, 96 of the other distributors, where the ratio of Eagle Lion is 6.04 and the ratio for the other distributors is 8.9. This breaks it down by distributors so that in the last column, on the bottom, which is a ratio to the national less the New York metropolitan first plus first run to New York metropolitan less first run: for Paramount it is .088, Fox .095, Warner .086, Loew .090, RKO .116, Columbia .091, Universal .066, United Artists .065.

In the aggregate, of the eight distributors, it is .089, and Eagle Lion is .064.

Mr. Raftery: I make the same objection we did to the 6.4 on the ground of irrelevancy, incompetency and immateriality.

The Court: You don't——

Mr. Raftery: We don't question the accuracy.

The Court: —question the accuracy.

Mr. Gillespie: The same objection.

The Court: I will receive it in evidence.

(Plaintiffs' Exhibit 26 for identification received in evidence.)

Q. Do you have, Mr. Gross, Loew's Exhibit B?

591 A. Yes, I do.

Q. Can you tell me, Mr. Gross, are those pictures shown on Loew's Exhibit B, that were distributed by Eagle Lion, how many of them were foreign-made pictures? A. In the subtitle Up to $500,000, where there are 177 Eagle Lion Pictures, 41 of those are foreign-made pictures.

Q. Did you determine the ratio shown in the righthand column for those foreign-made pictures? Or, perhaps, first you had better give us the corresponding figures there column by column. You have the aggregate. National rental less New York metropolitan plus New York first run for those pictures. A. Yes, of the 41 pictures included in the 177 up to $500,000, the aggregate national rental less New York metropolitan plus New York first run, that is a column figure, there are $2,853,000.

Q. What was the aggregate figure on those pictures for the New York metropolitan rental less first run? A. $376,500.

Q. Then what was the ratio on the last column? A. Ratio for those 41 pictures would be 13.2 percent

592 Q. Did you determine what the ratio showed in that same column for the 177 or, rather, for all of the Eagle Lion pictures under $500,000 would be if you excluded those foreign-made pictures? A. The ratio would be 5.0.

By the Court:

Q. It shows New York likes the foreign-made pictures better than the rest of the nation; is that what it comes out

to? A. They took a higher percentage out of New York than the rest of the nation compared to the other product, that's right.

Mr. Wright: I suggest also, if your Honor please, it shows that this schedule of Mr. Gillespie's does not rebut the notion that we were injured on the other pictures in that class of less than $500,000.

I will ask to have marked for identification as Plaintiffs' Exhibit 27 a schedule which is headed "Examples of Eagle Lion Pictures Which did not Play Loew or RKO Metropolitan New York Circuits but Which Grossed Nationally more than Major Distributors' Pictures which did Play one of these Circuits."

(Marked Plaintiffs' Exhibit 27 for identification.)

593 By Mr. Wright:

Q. Mr. Gross, will you just explain what that schedule shows column by column. A. Well——

Mr. Raftery: If your Honor please, until a proper foundation is laid for this exhibit we are going to object to a statistician testifying to the ultimate fact that a picture did not play on either the Loew or the RKO circuit.

I submit, your Honor, it is up to them, before they start putting in that kind of evidence, that they put in positive proof that they tried to sell the particular picture to RKO or Loew's and that Loew's would not buy or RKO would not buy.

Now, to just take figures and try to draw inferences before laying the foundation through the witnesses, all of whom are available, that is, the sales executives of Eagle Lion, is a very unfair comparison.

For example, Tornado Range, national film rental $58,700, did not play, according to the first one, either RKO or Loew's. Did they try to sell it to RKO or Loew's? What were they told by RKO or Loew's as to why they would not play Tornado Range?

594 Now the Heinemans, the Schwalbergs and Krasnes, they are all here in the City of New York. Until they lay that basis, we submit this sort of comparison is unfair and that this witness, who is merely a statistician, who knows nothing about selling or attempts to sell, cannot make comparisons with the idea of drawing an inference that a Fox reissue played and an Eagle Lion Tornado Range did not.

Was Tornado Range—we do not know the date. Tornado Range may have been released eight months after Shark Island or vice versa. We do not know the availabilities. No foundation has been laid for this exhibit of any kind or character. We are going to object to this line of testimony from this witness unless they lay the proper foundation.

The Court: Is there any objection to it on the basis of the facts as being factual summaries of answers to interrogatories?

Mr. Raftery: I don't know. I do not know.

For instance, Shark Island may have been released by Fox in 1948, in January. It may have been available. RKO may have needed the picture. On that particular day it may have bought it. Eagle Lion's Tornado Range, that
594 they are putting in as a comparison, may have been released months before or months after or years after. They may never have tried to sell it to either RKO or Loew's.

By the Court:

Q. Let me ask, did you prepare this exhibit? A. Yes, sir.

Q. And what is it based upon? Where did you get the data for it? A. The data is from the answers to the interrogatories and our own records.

Q. What records? A. The records that indicated the title of the picture, where it played first run, its national film rental and whether it played on a circuit—from Eagle Lion's own records.

Mr. Wright: I think you had better indicate the particular interrogatory source for each column.

The Witness: With respect to Eagle Lion it came from Eagle Lion's own records.

Mr. Raftery: May I press a further objection?

Every picture of Eagle Lion included in here is one of the 177 that grossed under $500,000 and on which the comparisons were put in yesterday.

595 The Court: I realize that. What I want to find out first is if there is any basic data of which this is a summary?

By the Court:

Q. Where did you get the New York first-run rental? A. The New York—let us take the first picture on the top, Fox's Shark Island. Fox's answer to the interrogatories indicated they had a picture called Shark Island that had no first run and its national film rental was $58,300. The RKO theatre company answered that Shark Island received $6300 from RKO.

Mr. Wright: That last answer was identified as Plaintiffs' Exhibit 25. It was offered, but it was only identified. It is not in evidence.

Q. Eagle Lion, you say you got from the records of Eagle Lion? A. That's correct.

The Court: I will accept it in evidence.

Mr. Gillespie: Your Honor, I wish to also object and principally on the ground that there is absolutely no showing, as the witness has said, in his records whether there was any attempt or occasion to sell the Eagle Lion pictures that are listed here.

596 The Court: Well, that is something certainly upon which you may cross-examine which may have something to do with the weight of the exhibit, but as to the admissibility of the exhibit, I think it is a summary of certain documents which have been marked for identification or which are in evidence. If they are not in evidence, they should be in evidence.

I understand the answers to the interrogatories have been put in evidence, have they not?

Mr. Wright: I offered the exhibit, and your Honor will recall that you said that you would prefer, because of their size, not to have them received, but if the figures were to be used in schedule form, since they were the defendants' own answers, simply put the schedule figure in.

The Court: These are a summary of what was identified and not received in evidence because we did not want to clutter the record. It is received in evidence and the objection is overruled and you have an exception.

(Plaintiffs' Exhibit 27 for identification received in evidence.)

Mr. Wright: I will ask to have marked Plaintiffs' Exhibit 28 for identification this schedule headed "Examples
597 of Eagle Lion pictures included in Loew's Exhibit B which received substantially lower circuit film rentals than major distributors' pictures in same national rental bracket."

(Plaintiffs' Exhibit 28 for identification marked.)

By Mr. Wright:

Q. Mr. Gross, I notice there is a star indicating a footnote in the title which is over on the second page. Perhaps in connection with the title and explaining the schedule column by column you should also call attention to what it is in the footnote. A. This schedule breaks down the pictures here over $500,000, taking an example from Eagle Lion or one of the other distributors in brackets of hundred thousands.

If you follow down, you see we go $500,000 to $600,000; $600,000 to $700,000; $700,000 to $800,000; $800,000 to $900,000; $900,000 to $1 million is out, and then you have $1.5 million to $2 million.

The reason that some of these brackets are not included here is that Eagle Lion did not have a picture in that particular bracket, so there was no basis for comparing them, and in one bracket where we did have a picture in the
598 $900,000 to $1 million, we had a picture He Walked By Night in that bracket and it received $76,000 in

circuit rentals. Of the 96 pictures that the other distributors had, there were three pictures in this bracket and they received substantially less than $76,000 circuit rentals, and that is the reason for the categories not running all the way.

The other instances is where there were no pictures for comparison purposes.

599 Mr. Raftery: We are going to object to this exhibit on all the grounds urged as to the other exhibit, and particularly on the ground that no play dates are shown, no basis laid by anybody, no indication of the terms under which each of the pictures were played.

For example, I notice here on T-Men Paramount had a picture which got a bigger film rental at Loew's and it may be that the Paramount salesman was a better salesman. We do not know anything about it. None of the facts are put in upon which comparisons are made. I do not object to the accuracy of the figures. I do not object to the mathematical computation. I merely say it is not proper evidence, and on the further grounds that I urged on the other exhibit.

Your Honor will recall that from the beginning of this lawsuit Mr. MacMillen, in his testimony, this witness, Mr. McGovern in his opening, Mr. Wright have all taken the position Eagle Lion is not making any claim of discrimination against a specific picture or any specific pictures, and in these two exhibits they just try to allege a claim of discrimination against specific pictures which is a

600 complete departure from the entire theory of the law suit, the theory of the lawsuit being solely that under the United States Paramount decree we claim a monopolization which discriminated not against any one of their pictures but against the entire 196 pictures.

Now, we think that we are getting far afield from the lawsuit.

Mr. Gillespie: Your Honor, I make the same objection. I would just like to point out one instance. In the second

group here I notice Big Cat and Woman on the Beach. From a quick check of my records here I find that Woman on the Beach is in the category of an RKO release in 1946-47, according to Mr. Gross' work papers that I marked for identification, and Big Cat in 1949, a two or three years' difference here. The figures are meaningless, your Honor, under the circumstances.

The Court: I think that is certainly something you can bring out by cross-examination or correction of this exhibit, but if it properly states the figures which appear in the exhibit which has been marked for identification, I will receive it in evidence.

Mr. Raftery: Your Honor, we will have no
601 opportunity on cross-examination because they are not going to produce a single witness that knows anything about these transactions. That is our problem.

The Court: You can bring that fact out on your cross-examination of this man who is on the stand.

(Plaintiffs' Exhibit 29 for identification received in evidence.)

Mr. Raftery: He did not go to work there until the lawsuit started.

The Court: That is right.

Mr. Wright: You may cross-examine.

Cross-examination by Mr. Raftery:

Q. Mr. Gross, you know absolutely nothing——

Mr. Raftery: I withdraw that. I am going to concede he knows something.

Q. Mr. Gross, did you have anything to do with the selling or licensing of the Eagle Lion pictures in the City of New York? A. Absolutely nothing to do with it.

Q. Now, who licensed the circuits here? A. I don't even know that.

Q. You don't even know that. Then I go back to my first

question. You know absolutely nothing about the
602 licensing or booking of any of these pictures in either the RKO or Loew houses? A. I only know the rentals as indicated as the result of the sale.

Q. You made no effort in these two exhibits to set up the play date for any of these pictures? A. Well, may I answer you there, you gave me a schedule, attempting somehow to analyze this by $100,000 brackets without——

Q. I didn't give you any schedule. A. Excuse me. Mr. Gillespie. Pardon me.

Q. What is it? What is the schedule? A. He attempted to analyze it at $100,000 brackets of whenever licensed, that was. I used the same license.

Q. So we are back now to your other schedule. Mr. Gillespie based that entirely on the schedule you gave him, isn't that a fact? A. Well, he arranged the pictures in this order.

Q. You gave him 196 pictures on a schedule—— A. Yes.

Q. (Continuing)—which shows grosses? A. Precisely.

Q. And he merely took your schedule and broke
603 them down according to grosses? A. And his own pictures and the other distributors'.

Q. I am talking of the 196, Mr. Gross. A. I am sorry.

Q. Everything on the 196, where he broke it down to 177— A. Yes.

Q. (Continuing)—of that 177 that you had on your schedule, it ended up that, as to those 177, you did better in the metropolitan area than the 96 pictures in those same brackets did, isn't that a fact? A. The ratio was 6.2 to 5.1.

Q. Right. So as to the pictures here, what you did as to the Fox picture Shark Island, you merely took the gross of that picture from the interrogatory? A. That is correct.

Q. You don't know when it played? A. No, sir.

Q. Or what the terms were? A. No, sir.

Q. Then you looked around the Eagle Lion list until you found Tornado Range? A. Yes, sir.

Q. And because the two figures were near each other on national film rental, you coupled them together?

604 A. Precisely.

Q. You don't know whether anybody ever tried to sell Tornado Range to either RKO or Loew's? A. No, sir.

Q. You don't know anything about the history of that picture in the metropolitan area? A. Except as to the figures.

Q. Except the figures? A. Precisely.

Mr. Raftery: That is all.

Cross-examination by Mr. Gillespie:

Q. Mr. Gross, turning to Plaintiffs' Exhibit 27, there is no indication on this exhibit as to whether these pictures played in the same year or in different years, is there? A. There are no dates on the schedule, no.

Q. You haven't attempted to group them in any respect as to years? A. No, sir.

Q. They may have played four years apart? A. Possibly, yes, sir.

Q. The same is true with respect to Plaintiffs' Exhibit 28? A. Which one is that?

605 Q. I am sorray, that is the one—— A. Yes, that is—all right.

Q. That is—— A. That is right.

Q. Same is true as to Plaintiffs' Exhibit 28? A. That is right.

Q. It is a fact, is it not, Mr. Gross, that the national grosses of the pictures vary from year to year throughout the industry, one year is a good year, another year is a poor year; is that not correct, they vary from year to year? A. Only thing I can say is picture grosses vary. Maybe the overall motion picture industry grosses vary. In so far as they vary, individual cases might vary. It might be difficult to say where it was, business, pictures, or both or neither.

Q. But they do vary? A. Yes, they vary.

Mr. Gillespie: That is all.

The Court: I notice on Plaintiffs' Exhibit 28 that all of the pictures which you have on that exhibit are pictures which had a national gross of over $500,000; that is correct?

The Witness: That is correct.

606 The Court: And on that exhibit you have seven Eagle Lion pictures, and your footnote mentions one other, eight. Eight Eagle Lion pictures.

The Witness: That is right.

The Court: And Defendants' Exhibit B stated there were 19 Eagle Lion pictures which grossed over $500,000—

The Witness: Yes, sir.

The Court: (Continuing) —in this period of time.

And none of them, of the other 11, fall in any one of these categories?

The Witness: Yes, this is an example from each category.

The Court: Just one example?

The Witness: From each category.

The Court: You haven't attempted to put each Eagle Lion picture in that exhibit so as to see whether some grossed more or less on the circuit?

The Witness: No, sir.

The Court: You took the ones which were most favorable to your position?

The Witness: Yes, we did.

Mr. Wright: That is all.

(Witness excused.)

607 Mr. McGovern: Judge Dawson, I think that the plaintiffs are prepared to rest at this point.

The Court: I haven't so far admitted the findings of fact in the Paramount case in evidence, as I recall.

Mr. McGovern: That is right, you haven't.

The Court: I was looking for that decree in the case, which I had here when I started this trial.

Mr. McGovern: I think we have it.

The Court: Let me have it.

I will at this time admit in evidence the findings of fact and conclusions of law in the Paramount decree. I do it because the decree provides that the findings of fact and conclusions of law heretofore made are superseded by the findings and conclusions now entered in support of this decree.

If the Court is in a position where it must take the decree in evidence, then the findings of fact and conclusions of law which were entered in support of the decree, I think, also properly belong in evidence.

In any event, the Court would have to take them
608 into consideration in appraising the decree, and I will, therefore, admit those findings of fact and conclusions of law in evidence.

And they were marked, I believe——

Mr. Wright: 1 and 2.

The Court: (Continuing) —Plaintiffs' Exhibit 2. The decree I have already admitted in evidence.

Mr. Wright: Yes.

The Court: Yes. Plaintiffs' Exhibit 2 for identification is now received.

(Marked Plaintiffs' Exhibit 2 in evidence.)

The Court: Are there any other exhibits concerning which there is any question as to whether they should be received in evidence?

Mr. McGovern: I think not, your Honor. I think we cleared it up yesterday before we concluded.

The Court: Then the plaintiffs rest, I take it?

Mr. McGovern: That is right, sir.

Mr. Raftery: If your Honor please, the defendant RKO moves to dismiss the plaintiffs' complaint on the ground that they have wholly failed to make out a prima facie case. They have failed to show any discrimination by the RKO

theatres against Eagle Lion in any respect, and I submit the decree does not make out a prima facie case.

609 And I am moving on all the grounds that I usually urge at the close of a plaintiff's case, and Mr. Gillespie is going to make a little argument on that motion.

The Court: All right. I will wait until I hear Mr. Gillespie's argument before I rule.

Mr. Raftery: And you are going to make a separate motion?

Mr. Gillespie: Yes.

On behalf of Loew's, I move to dismiss the complaint on the ground that the plaintiff has failed to make a prima facie case out.

I would like very briefly to refer to what Mr. Raftery just said about the Paramount decree in the Paramount case.

I know that your Honor has received the decree and the findings of fact in evidence here, but I think it is still within our right to show that they don't apply to this particular situation.

In that connection I would like to call your Honor's attention to something that occurred in January 1950, just before the Court entered the decree in the Paramount case.

There was a hearing before Judge Hand and
610 the two members of the expediting court on the 17th of January.

Shortly prior to that, on the 9th of January, the Department of Justice suggested an additional provision for the decree, which was directed specifically at what they called the New York situation.

They addressed a letter to Judge Hand, dated January 9th, providing for this—January 9, 1950, providing for this additional section in that decree.

It was to read this way. They wanted to have the defendants——

The Court: Where is this letter? Is it part of the record or how does it get into this case?

Mr. Gillespie: Your Honor, it is part of the record in the Paramount case, and I understood that your Honor felt that you could look, not only to the findings, but to all the things in the Paramount case. I am drawing something specifically to your attention.

The Court: I can tell you this. Having found what a task it would be to wade through that whole roomful of papers, I don't want anything mentioned here which is not specifically marked in the record of this case, so that I specifically have that document before me.

611 Mr. Gillespie: Your Honor, I have a copy of the letter here. I will refer specifically to the record in the Paramount case, without reading the letter, if that will make it simpler.

Mr. Wright: May I see it?

Mr. Gillespie: Yes, but please give it back to me.

The Court: This is the record in the Paramount case?

Mr. Gillespie: This is the record in the Paramount case, your Honor.

The Court: What page?

Mr. Gillespie: It is 894 of the record on remand, your Honor, when the final decree, which your Honor has just admitted in evidence or has admitted in evidence in this matter was being formulated by the Court.

At that time the Government suggested this provision, and I believe it is set out specifically here in the record, but the provision, if I may read it from the letter here, was to provide as follows: From consulting or agreeing expressedly or impliedly with any competing exhibitor as to whether particular pictures shall be licensed to par-

612 ticular exhibitors or as to whether the pictures of particular producers or distributors shall be licensed to particular exhibitors.

That was the provision, and counsel for the Government argued at page 895, and I should say counsel at that time was not Mr. Wright, it was Mr. Marcus, Mr. Philip Marcus,

and he stated at page 895 of the record, when this decree was being submitted, "And the basis of that proposal is the fact that, as this case has demonstrated, there is a comm on condition in this industry of the exhibitors; that they, certain of the exhibitors, will get certain of the product of the distributors and certain of the other exhibitors will get the product of certain other distributors, and this is particularly true of New York City."

This argument was answered by counsel for the defense, and in extenso, pointing out that there was no evidence, and even though these findings had been made, that your Honor has received here, that there was no basis for this injunctive provision as against the defendants. That was argued in extenso on this record and, finally, at page 925 of the record, Judge Byrnes, representing Twentieth Century-Fox at that time, got to his feet and was going to
613 argue this matter further, and Judge Hand interrupted him and said, "I wouldn't argue about that letter. I don't believe that we are ever going to add that clause that they want. That is the letter you were talking about, Mr. Byrnes?"

"Yes."

Then Judge Hand turned to Judge Goddard.

"Judge Goddard: The January 9th letter?

"Judge Hand: Yes. I don't believe we are going to do anything about it, is that right?

"Judge Goddard: That is right.

"Judge Coxe: Yes."

So, your Honor, here was the court that had before it the findings that your Honor has received in evidence dealing with what the Government said was the very situation dealt with in those findings and which is claimed to be the situation here, and the expediting court declined to include that provision in the decree.

Under those circumstances, your Honor, we submit that this decree and these findings cannot be taken as prima

facie evidence of a conspiracy or combination on the part of these defendants.

Turning to one or two other things which we believe
614 that, not only for that ground, but on the further ground that the plaintiffs have not shown in any way that they have been excluded from an opportunity of licensing their pictures to Loew's and the RKO circuit on a competitive basis—in my opening I stressed those words, "on a competitive basis," and mentioned to your Honor that we asked that those be included in the pretrial order formulating the issue here, for the reason that we wanted to be able to be in a position that the plaintiffs should come forward as part of their case with proof that what they were offering was competitive with what the other distributors were offering, and I submit, your Honor, that there hasn't been a word of proof to show that the product is comparable to that of the eight distributors. What we have seen here is nothing about exclusion. In fact, admission that these pictures have gotten into our theatres.

The plaintiffs did come up with this ratio of 6.4 to 8.9. I submit that the other end of that ratio, that is, the national picture, might be varied up and down by unlimited things.

In addition to that, I think we have shown by our Exhibit B that of 177 pictures—that on 177 of these pic-
615 tures they clearly did better here in New York than the eight majors did on their less-popular pictures or the pictures that did not do as well at the box office nationally.

And the remaining 18 pictures, yesterday Mr. Gross went through those pictures with me picture by picture, and your Honor will remember that every one of those 18 pictures—Red Shoes comes in twice—every one of those 18 pictures had an exhibition on the long half except one, and that was Red Stallion In the Rockies, as I recall it, which was on the short half.

Of those 18 pictures, six had top billing, 10 were billed as second feature on the long half.

Exclusion? Your Honor, it is fantastic that they can come in here and urge exclusion under those circumstances, and this in the plaintiffs' case.

This is not the defendants coming forward with that proof. On the plaintiffs' case they have shown that they haven't been excluded.

There is a complete absence here of any proof, and it seems to me that it is almost startling that they have failed to bring to this Court one single witness to testify that they tried to get pictures shown in a particular way or in
616 another way and that the defendants refused to do so.

On the contrary, the 18 best pictures they had had the showing that I have referred to.

Under those circumstances, your Honor, we submit that the plaintiffs have failed to make a prima facie case.

Your Honor gave them the opportunity last night to meet some suggestions and the plaintiffs haven't come forward in any respect with the proof that is necessary, as we see it, to make a prima facie case on the proposition that it was this alleged conspiracy or combination that injured them. On the contrary, it would appear, so far as anything is concerned here, that anything is before the Court here, that it was just some figures, and that their pictures got a certain percentage and that defendants' pictures got a certain percentage.

Under the circumstances, we submit that the complaint should be dismissed.

Mr. Raftery: In addition, there has been no proof at any place in this record that they tried to sell their pictures either to RKO or to Loew or to any of the other 700 theatres in any way different from the figures indicated.

617 Furthermore, your Honor received in evidence the certified public accountant's picture of the Eagle Lion operations, which showed failure, failure, failure straight across the board, production, distribution, everything.

We submit, under the state of the record, their failure to call their sales executives to show the facts as distinguished from the figures, that the motion of both defendants should be granted.

The Court: I will deny the motions.

You may have exceptions.

Mr. Raftery: May we have five minutes?

The Court: By all means.

(A short recess.)

618 Mr. Raftery: I call Mr. Robert Miller.

Robert L. Miller

called as a witness by the defendant RKO, being first duly sworn, testified as follows:

Direct examination by Mr. Raftery:

Q. Mr. Miller, where do you reside? A. 238½ North LaPeer Drive, Beverly Hills, California.

Q. How long have you resided in California? A. Since August 1st of 1954.

Q. Prior to that time were you associated with RKO, the theatres? A. I was.

Q. And for how long a period were you with RKO Theatres? A. Well, from April of 1932 until April of 1942 I was in the general accounting department for Radio-Keith-Orpheum Corporation. Following that there was about four years of United States Air Force, and then at the end of 1945, December of 1945, I came back and was given the job as office manager in the film booking department of RKO Theatres.

Q. And you continued in that capacity until when?

619 A. Until mid-July of 1954.

Q. And during that period one of your duties was preparing statistics, was it not? A. That's right.

Q. And you have prepared certain statistics or did pre-

pare, while you were employed by RKO, certain statistics in connection with this litigation? A. Yes, sir.

Q. I show you a document which I used in the cross-examination of Mr. Gross and ask if that was prepared by you (handing). A. Well, it was prepared under my supervision. It is not in my handwriting but it was prepared——

Q. And you checked it? A. Yes, as part of my work. I was responsible for this.

Q. And you vouch for its accuracy? A. Yes, sir. There have been some corrections made here in the courtroom on the second page. I never saw the letters correcting it. I think it was T-Men or Tulsa.

Q. T-Men. A. T-Men.

Q. Outside of the corrections that have been
620 made in the courtroom here and which I have consented to, this document, you vouch for its accuracy? A. Yes, sir.

Q. And the first page has to do with the exhibition in the art theatres? A. In the art theatres, yes.

Q. And we reach that figure which we have agreed to with Mr. Gross of 14.3 on the art theatres? A. Yes, a ratio of 14.3.

Q. And the second one has to do with the first-class, first-run theatres? A. We agreed to an even 9.0 figure.

Q. And the third one has to do with the second-class Broadway theatres? A. Yes. We agreed to the figure of 3.55.

Q. 3.55. And the fourth is the Palace Theatre? A. Yes, the Palace.

Q. And the agreed figure was 4.07? A. 4.07, yes.

Q. And the fifth page had to do with Eagle Lion reissues? A. That's right, sir.

Q. And the sixth had to do with Eagle Lion for-
621 eign-made releases; right? A. That's right.

Q. And the next page had to do with Eagle Lion

releases produced by Eagle Lion that had no first run in New York City? A. That's right.

Q. And the next page had to do with what? A. Outside American producers that had no first run in New York City.

Q. And—— A. The final page was the roadshow of The Red Shoes in the Bijou Theatre.

Q. In New York? A. In New York.

Mr. Raftery: I offer this document.

By the Court:

Q. What data was that based upon, Mr. Miller? Where did you get the figures? A. This is from information basically furnished by Eagle Lion, I think through the earlier interrogatories in this case, sir.

The Court: Is there any objection to the exhibit?

Mr. Wright: If it is what I think it is, I do not
622 think there is, but I want to see if we have a copy.

Mr. Raftery: You have had a copy for a couple of years. This is the document that Mr. Gross testified was primarily prepared from figures furnished by him to us.

The Court: I understand.

Mr. Wright: If the Court please, this is apparently a copy of what we have and we know what those figures are. We do not object on the ground that any figures there are inaccurate; we do object on the ground that it is not a proper measure to cut up these pictures into these various segments. We say the only proper measure of our damage is the overall view of our business as compared to the overall view of their business.

The Court: That of course is an issue in the case, but we will receive it in evidence if you have no objection to it as being accurate and being an accurate statement or summary of certain admitted figures in the case.

Mr. Wright: As to what it shows, it is accurate.

The Court: It is received in evidence.

(Defendant RKO Exhibit A received in evidence.)

623 Mr. Raftery: I have a copy of it now for your Honor.

The Court: I would like to have a copy.

Mr. Raftery: Suppose you give his Honor the original exhibit because the fifth lines are not added on this copy. I will leave this for the witness.

The Court: All right.

By Mr. Raftery:

Q. Mr. Miller, during the time that you were with RKO Theatres where was your office located? A. You mean in recent——

Q. I mean from 1946 to 1950. A. We were in Radio City, in the RKO Building, now, I believe, called The Americas Building.

Q. And did you have a projection room in that building? A. Yes and no. The screening room which we used was Screening Room B of the Music Hall, which is really an adjoining building rather than a part of the same building.

Q. It was right in the premises there? A. In the premises.

Q. And, for the record, what is a projection room
624 as distinguished from a theatre? A. Well, as far as size is concerned, it is just for a limited number of people, people who are looking at the picture for the purpose of whether they are going to buy or book those particular pictures. In other words, it is for professionals, I would say, professionals in the industry.

Q. Did RKO Theatres screen pictures prior to licensing them, generally, during this 1946-1950 period in that projection room? A. They did.

Q. And did you keep a record of every screening of every picture that was screened in there for your film buyers or whatever you call them? A. Yes. It was kept under my supervision.

Q. That particular record showed every Eagle Lion pic-

ture that was screened in that projection room; isn't that a fact? A. That's right, for our people.

Q. Did you screen the pictures of others in there in addition to Eagle Lion? A. We did.

Q. And that included the eight former defendants in this case? A. That's right.

625 Q. And the other companies that you dealt with? A. Right.

Q. Or did not deal with? A. Right.

Q. Did you have made for us a list of every picture of Eagle Lion's out of the 196 that were screened by your company in this projection room? A. Yes, we did.

Q. Have you it before you there? A. I have.

Q. What appears in the first column? A. The first column is the title under which the picture was released.

Q. And I notice as part of that first column the word "R" appears. A. "R" in this case stands for reissue. In other words, it is a picture that had a previous release.

Q. Where did you get that information?

Mr. McGovern: Could I interrupt, your Honor, to suggest it might be clearer in terms of our notes and the record if it was marked for identification before the witness starts identifying columns, so we will know what exhibit is being described.

The Court: All right, mark it for identification.

626 Mr. Wright: Do you have a copy for us so we can follow?

Mr. Raftery: This is the only one I have. In a minute I will give it to you.

(Marked Defendant RKO Exhibit B for identification.)

Q. From where did you get the information that the picture was a reissue, or, to shorten it, was that taken from the list of releases furnished by Mr. Gross? A. Yes. Well, whether by releases or whether by some other document within the papers they had furnished us, it had indicated whether it was a release with this symbol "R."

Q. A reissue. Where did you get the production numbers? A. Those are furnished in the papers furnished us by Eagle Lion.

Q. Right. And the release dates? A. Those are furnished by Eagle Lion with these papers.

Q. You have listed here in the next column a series of check marks indicating whether it was an American-made picture or a foreign picture? A. Right.

627 Q. Where did you get that information? A. That also came from information furnished by Eagle Lion.

Q. Let us go back to your screening book.

What about the next column? There is an indication of a date. A. Yes. That is the date on which the picture was screened in our screening room.

Q. And the hour of the day? A. Yes. These will all be afternoon except possibly a few in the morning. I notice here on the first page a few at 10.00 o'clock. Most of them would be from noon on.

Q. And the running time of the picture; is that indicated? A. Yes, sir, where we have the information the running time is here because it is very important in booking pictures.

Q. This information about the cast, where did you get that? A. Part of it came from the screening book—the information comes from the distributor as a rule when he sets up the screening with us. Some of it may have

628 come from trade journals where we did not have first names and where the foreign actors are not too well known, I dug that out of the different trade papers that list the full names in connection with these pictures.

Q. Take Black Book, number one. There is a blank on the date screened by RKO Theatres.

What does that blank mean in relation to your screening room? A. It would indicate that we never screened it in our screening room. It is possible that our buyers looked at this picture, say, at a preview or possibly in a trade showing outside of our building. If we had that information,

we could have put it in, but we did not have that information for a few of these pictures.

Q. So you only listed the ones that were actually screened in your screening room and a record made of the screening in the screening book? A. That's right.

629 Q. Out of the 196 listed here, how many were actually screened in your screening room? A. 129 were actually screened, according to this list.

Q. And according to the permanent record kept at your office? A. Yes.

Q. Now, of those that were not screened? A. 25 were reissues which probably had been screened when they were originally issued. That I did not dig back all the way through to find. If we had gone back where they were issued the first time, we could have found that information.

Q. And how many were westerns? A. 31 were westerns and 11 were other than westerns.

Q. So out of the 196, except for the 25 reissues and 31 westerns, only 11 of the 196 were not actually screened in your screening room? A. That's right.

By the Court:

Q. Why didn't you screen the westerns? A. As a matter of policy, we did not screen all westerns. If a new

630 series was started, your Honor, we would screen perhaps one or two out of that series and then after that they did not change enough to make it worth our men having to sit through all the westerns in the series.

By Mr. Raftery:

Q. Isn't it a fact, Mr. Miller, westerns in series did not play in the first neighborhood runs in the RKO theatres, as a rule? A. As a rule, I would say they never did.

Q. Now, RKO in those days, 1946 to 1950, was a part of the old RKO Company, was it not? A. That's right.

Q. And RKO, the picture company, released the Tim

Holt series, if you recall? A. Yes, Tim Holt was a series of westerns produced by RKO Pictures.

Q. And never played your theatres? A. They were not screened or played.

Q. And that applied to any other company that had that type of picture? A. That's right.

Q. And that is true in the metropolitan area? A. That's right. We would not screen, for example, a picture from Columbia in the Starrett series.

631 Q. You did not screen them and you did not play them? A. We did not play them.

Q. And you vouch for the accuracy of this exhibit? A. Yes, sir.

Mr. Raftery: I offer it in evidence.

By the Court:

Q. Let me ask you something I do not understand. In the fourth column which is headed "Eagle Lion Films," I notice that there are some checks opposite some of those and not opposite others.

What is the significance of the checks? A. It was our understanding that those were outright Eagle Lion productions.

Q. Those were—— A. In relation to their outside producers or their foreign films.

Q. Those were produced by Eagle Lion, as you understood? A. Yes, that was my understanding.

Mr. Raftery: Those are the checks that appear first on the second page, your Honor.

The Court: All right.

Any objection to this being received in evidence?

Mr. Wright: No. I would like to have a

632 copy, that is all.

Mr. Raftery: I will give you mine if you will give it back to me.

The Court: It will be received in evidence.

(Defendant RKO Exhibit B for identification received in evidence.)

By Mr. Raftery:

Q. Mr. Miller, ——

Mr. Raftery: I am going to do this page by page, Judge.

The Court: Is it another exhibit or the same one?

Mr. Raftery: This is another exhibit.

(To clerk): Mark the first page. That will be for identification.

Mr. Raftery: Mark the second page C-1 and then the succeeding pages.

(Marked Defendant RKO Exhibits C-2, C-3, and C-4, respectively, for identification.)

By Mr. Raftery:

Q. Now, Mr. Miller, I show you Exhibit C for identification and I ask you if you prepared that document or
633 had it prepared under your supervision which is it, just the first page? A. I prepared this from—this is a copy of one of the performance records which we keep.

Q. And what picture has that to do with? A. This is Destination Moon, which is a production number 026 from Eagle Lion.

Q. And that played in the RKO neighborhood theatres in the City of New York; isn't that a fact? A. Yes, sir, starting on January 9—I don't have the exact year, whether it was 1950 or 1951.

Q. 1950.

Mr. Wright: I did not get the date. What was that?

Mr. Raftery: January 9, 1950.

Mr. McGovern: May I suggest, Mr. Raftery, I think that date should be 1951.

Mr. Raftery: Was it 1951?

Mr. McGovern: I thought you said 1950.

The Court: It was only screened in December, 1950, according to this.

Mr. Raftery: 1951 is the correct date.

Q. Now, that picture played in each of the theatres listed starting with the 81st Street down to and including
634 the Colonial; is that a fact? A. That is the Colonial Theatre in Manhattan, yes.

Mr. Wright: This is without a copy. We cannot tell what that means, "down to and including." Have you got a copy?

Mr. Raftery: I haven't a copy. This is the only copy in existence.

Q. Now, did you compute from your records the playoff of this picture showing the gross receipts, the film rental paid to Eagle Lion, the profit or loss on the engagement in each of the theatres? A. We did.

Q. Now, what were the total gross receipts on the engagement?

The Court: Receipts by whom, the theatres?

Mr. Raftery: The theatres.

A. The theatres grossed $136,866.

Q. And how many cents? A. And eight cents.

Q. How much film rental did you pay to Eagle Lion on that picture? A. $33,600.86.

Q. Did you make a profit on the engagement? A. The record shows that we lost $14,920.15.

635 The Court: Are you going to do this with all pictures?

Mr. Raftery: About five pictures. It indicates that we played their pictures, paid them big film rentals and lost money on some and made money on some. That is a sampling procedure.

The Court: Out of all those pictures you can get samples to prove almost anything. I think that is applicable to both sides in this case.

Mr. Raftery: I do not agree on our side.

By Mr. Raftery:

Q. Now I show you Exhibit C-1. It has to do with Red Shoes played January 31, 1951, in the neighborhood RKO theatres listed on this schedule.

Have you got the summary on that engagement? A. The theatres grossed $250,123.34. The film rental paid to Eagle Lion on the engagement was $63,193.96.

Q. And what profit did you make? A. The profit for RKO theatres was $5,596.88.

The Court: "Profit" is one of these elusive terms. Profit after what? What do you deduct in deciding what profit is?

The Witness: We used the same expenses, your
636 Honor, on these pictures in preparing these performance charts that we used for all companies, all products. This record was for the enlightenment of management as to how we were doing on the circuit.

The Court: What did you deduct there? Did you deduct the payroll of the theatre, the taxes on the theatre? What did you deduct to arrive at the figure of a profit?

The Witness: You have, as you mentioned, payroll, film rental, advertising, rent for the theatre, lights, water, electricity, in other words all the utilities that go to make up the theatre.

The Court: Management fee?

The Witness: Management fee.

The Court: Management fee to RKO?

The Witness: Yes, sir.

By Mr. Raftery:

Q. To RKO Service Corporation? A. Yes.

Q. And that is only a percentage of the gross? A. Yes, it works out to a percentage of the gross. It is paid to a company that makes no profit at the end of the year. It is simply to divide the expenses of all theatres.

637 Q. Now, Jackie Robinson Story. That was played as a double bill with Story of G.I. Joe; isn't that a fact? A. That's right.

Q. And will you give us the summary on that? A. The theatres grossed $172,402.36, the film rental was $42,116.57, and the profit was $36,169.94.

Q. Now, you played two sets of reissues during this period. I show you Rebecca and the Paradine Case. Those are two of the 196 pictures listed as reissues, and you played those on the so-called short-half; is that right? A. Excuse me, sir. May I make a correction? I do not believe Paradine Case is included in the 196. It is an Eagle Lion picture and played here as a combination with a picture that was included.

Q. And you paid $7,500 flat for the two of them; isn't that a fact? A. No, we paid $5,000 for the two pictures.

Q. And you played it short-half? A. We did.

Q. And what did you gross? A. The gross of the theatres was $31,682.55.

Q. And how much did you lose on the engage-
638 ment? A. $13,668.92.

Q. Now, Arabian Nights and Sudan, are they part of the 196? A. They are.

Q. What did you gross on that pair? A. We grossed $39,034.92.

Mr. Wright: Could we have the dates on these?

Mr. Raftery: Yes. July 18th—

Mr. Wright: I did not have the Paradine Case. When did that go into the circuit?

Mr. Raftery: It played with Rebecca.

Mr. Wright: And the date when it went into the circuit?

Mr. Raftery: It played in the theatres, in some of them, March 20th and 21st, in the others March 27th and 28th. That's it.

Mr. Wright: What year?

Mr. Raftery: 1950.

Mr. Wright: 1950?

Mr. Raftery: Yes.

Now, the other one played July 18, 1950, for one day in some of the houses, and for two days, 17th and 18th,

in a few of the houses, for one day on the 25th of
639 July in a group of houses, on July 24th and 25th in one house and on July 26th in one house.

By Mr. Raftery:

Q. Now what was the gross on that engagement? A. $39,034.92. The film rental was $5,000 for the combination.

Q. And what profit did you make? A. We had $697.31.

Q. From all the theatres? A. From all the theatres.

Q. Now, Canon City and Raw Deal, they were both Eagle Lion pictures? A. That's right.

Q. And they played December 1 to 5, 1948, in some of the houses, December 8th to 12th, same year, in another group of houses, and carried over to December 6th and 7th in some of the houses and December 13th and 14th in some of the other houses? A. Yes.

Q. What film rental did you pay Eagle Lion on Canon City? A. The film rental was $76,580.14.

Q. And what did you pay on Raw Deal? A. $11,325.

Q. And what profit did you make on the whole
640 engagement? A. $21,039.90.

Mr. Raftery: Now I am going to offer this exhibit.

The Court: Any objection?

Mr. Wright: We would like to examine it when we have had a chance to see it.

The Court: I won't rule on its admissibility at this time. You look at it over the lunch period.

Mr. Raftery: You may examine.

Mr. Wright: I think if we could have a recess we could have a chance to look at this.

The Court: Ten minutes?

Mr. Wright: That would be helpful.

The Court: We will take a ten-minute recess before we start cross-examination.

(Short recess.)

641 Cross-Examination by Mr. Wright:

Q. Mr. Miller, what is your present occupation? A. I am an accountant with Pacific Drive-In Theatres.

Q. This record you have identified as Exhibit C, and subsequent pages, those are records kept in the ordinary course of business by RKO by you, were they, or by someone else? A. They were under my supervision. They were kept by somebody else.

Q. I would like to know if you can tell me just what these figures are supposed to represent that appear in each column. The first, under "Date" that shows what? A. These were the play dates on which the pictures showed.

Q. In a particular theatre. Does each horizontal line represent a theatre? A. That's right.

Q. Do you—how do you tell what theatre? A. From the extension sheet over here on the side.

Q. This sheet on the left has a number that tells you the names of the theatres, is that it? A. Yes, sir.

642 Q. Is that— A. That will apply to practically all above the formula. Sometimes the Midway is shown in this position and sometimes the Midway is shown below. I believe some—

Q. You mean they might make a mistake and not get in the right number? A. No. It would depend on how the terms for the picture applied. In other words, in the old days, when the pictures were bought for the circuit—could I show you an example, Mr. Wright?

Q. Surely. A. Under the "Remarks" column, I have here, you will notice, on Canon City—

Q. You are pointing there to this RKO C-4, is that right? A. C-4, yes, sir. You will notice the terms on Canon City were 34 theatres for five days, 25 percent for $230,000, plus 50 percent over. The additional days it played would be at 20 percent. The Alhambra and Colonial would be five percent less, when you figure their film rental. Midway would pay the same percentage as the circuit. In

other words, that would be an overall percentage.

643 So sometime the Midway, if it weren't bought in this manner, would be shown under this line for Midway. In this type of a calculation, where there were several deals, it was down below.

Q. That kind of deal you wouldn't allocate the rental to the individual theatres, is that it? A. Their rental is figured after you figure the 34 theatres.

Q. Then you have a column headed "Units." Can you tell us what appears under that? A. I believe we discussed long half and short half on the circuit. We have agreed on that. That—

Q. Just tell me what the figure "6" under "Units" means. A. That means it would have 6 units of playing time, depending on the particular days of the week that the picture played.

Q. What is the relationship of the units to a particular day of the week? A. Sunday counted three units, Saturday counted 2 units, and the other days of the week only one unit.

Q. That same system applied throughout all of it, wherever you see the unit figure? A. Yes, sir.

644 Q. How about the holidays? Any difference in the unit terms? A. Not that I recall.

Q. Can't say as to that? A. No.

Q. In the next column, where you have "Receipts," those are what? A. Those are the theatre admissions that were paid at that particular theatre.

Q. During that engagement? A. Yes, sir.

Q. That was a double feature engagement, and that column has the total receipts for the double bill, or is there any allocation? A. No, the receipts would be the same.

Q. Total for that theatre during the— A. For the—

Q. —six units engagement? A. That's right.

Q. Then the column that says "SS Percentage," what does that mean? A. Those are the earnings which were paid on the—by that particular theatre. In other words,

we are looking at line 1, which is 81st Street. They
645 earned 25 percent on that deal.

Q. That "SS", does that refer to sliding scale? A. Sliding scale, and the percentage underneath refers to a percentage, could be sliding scale or could be so much to a split.

Q. These terms are taken off the contract, are they? A. Yes, sir, those would be from the contracts.

Q. Do you have reference here to the contract? Does the contract number appear in there anywhere? A. There is no contract number, but the terms are scheduled here under "Remarks" for each of the theatres in that particular situation.

Q. What you have under "Remarks" then are the terms of the contract; is that right? A. That's right.

Q. And then in the first column, under that it says 25 percent to, and then you have a lot of figures underneath it. What does that mean? A. In other words, 81st Street, in this case, would pay 25 percent until the gross reached $5,141.25. Then from that time the distributor would get 50 percent over.

Q. Then I see you have a figure, 66-2/3 percent
646 over. A. That's right. They would go on up on the next series of figures. 81st Street stopped at 50 percent in this deal. If it were 23rd Street, they would pay 50 percent on the next block, and then if it went beyond the total of those two figures, or $6,648.75, from that time on the distributor would get two-thirds.

Q. You have different sliding scale figures for the different theatres. Those are— A. These would be, really, split figures rather than sliding-scale figures.

Q. By split figure you mean a figure—there would be an additional percentage? A. Amount after that point.

Q. Do you know how those sliding scale and split figures are determined? A. This would have come out of negotiations between our film buyers and the salesmen for the distributors.

Q. Those are purely arbitrary figures? A. Negotiation between the—

Q. Do they bear any relation to your house expenses? A. I suppose there might be a relationship, but whether there would be a uniform relationship, that I cannot answer.

647 Q. If there is a relationship, you don't know what it is? A. I don't know what it is, that's right.

Q. Now the next column after SS Percentage here, going back to the beginning of the sheet, I believe that is the fourth column, you have the heading "Deduct from Gross." Then you have some figures under that. Can you explain what that means? A. Yes. We will go down to line 11, to the Royal Theatre. These are houses—there are several houses, you will notice, there are deductions in several columns, played vaudeville, going by memory now, I would say Tuesday night—it might have been Monday night—but I say Tuesday in this case, where we, in making the deal with the distributor, we would get permission to deduct the cost of a vaudeville from the gross receipts in making the calculations for film rental.

Q. How were those costs—

The Court: Did you add the popcorn in?

The Witness: No, sir. Concessions don't relate to these figures in any way, your Honor.

Q. How did you figure the amount of those
648 vaudeville deductions? A. It would be based on whatever was the cost of the vaudeville acts and the minor expenses that went with it. If there was some advertising, it would be thrown in, and I think they had to hire an extra stagehand, and that sort of thing, in order to put on this vaudeville.

Q. That figure represents an allocation of the total vaudeville cost to that particular theatre that you made? A. I don't believe there is any allocation in that sense, and I think each theatre would have its own bill for this vaudeville, whatever the acts were that played that night;

would be billed to that theatre; and their own stagehands and so forth would also be paid by the theatre from their payroll.

Q. Can you tell me whether these figures you have here are the actual vaudeville expenses incurred at that time? A. Yes, as near as we could—

Q. Or is it an allocation? A. Yes, as near as we could determine at the time; we tried to get as exact figures as we could for the cost of the vaudeville.

Q. The next column headed "Rentals" that is
649 what was paid to the distributor? A. That's right.

In other words, that is a calculation for the payment to the distributor.

Q. That was determined in the case of the first feature there, Destination Moon, by taking a percentage of the receipts; is that right? A. That's right.

Q. Then I see you have a column headed "Second Feature Rental." A. That's right.

Q. Where do the terms for the second feature appear? A. I don't believe they are shown here on this. I think they show it on the performance; basically related to the top picture, and didn't try to relate the second features.

Q. You have a "Second Feature Rental" there, that is, a flat figure, don't you, for all the theatres? A. Well, it isn't—when you say flat rental for all the theatres, I am not sure whether we had a deal whereby we had agreed to, say, $8,072.50. That doesn't—offhand I would say no, it was a price set for each tneatre that showed the picture.

Q. You cannot tell from looking at this sheet,
650 though, whether there was a flat rental deal for all the theatres that bought or whether there was an individual price worked out? A. No, that I can't tell from this record.

Q. Did the price that you have got in here for the second feature opposite each theatre have anything to do with the receipts which each theatre took in? A. No.

Q. That next column, when you get over under "Profit," the red figure is what you term a loss? A. A loss.

Q. And the black figures are what you call the profits? A. That's right.

Q. I think you said in figuring that profit or loss you used some kind of a uniform figure for all pictures, uniform expense figure. A. It was basically—I can give you a formula we followed, if I can remember it. I am doing it from memory, which is getting a little out of date, but you would try to allocate to each theatre the actual cost of a film rental that related to that playoff. You would also try to get the exact advertising as near as you could.

651 Q. Just a minute. What is the amortizing? A. Amortizing?

Q. I don't know what figure you are talking about. Amortizing what?

Mr. Raftery: Advertising.

The Court: Advertising.

Q. Oh, advertising? A. I am sorry. Yes, advertising. I am sorry I am confusing, sir.

We tried to get the exact advertising because on some pictures you would spend a lot of money and on others you would just spend a normal amount of mon y. So it would have an effect on the performance and an effect on your profit.

Q. Do these figures— A. Beyond a certain point this would—

Q. Just a minute. I want to ask a question about the advertising expense. I see these figures that you used in computing this profit and loss here reflect, then, the actual advertising expenses of the theatre for that engagement, or did they represent an allocation of an overall expense? A. Which would be allocated. As I remember it, Foote, Cone & Belding placed the advertising and gave us

652 the allocations as to how they should be broken down among the circuit dealers.

Q. And that allocation, however it is made, however, does not appear on anything we have here. A. No, we don't have that allocation here.

Q. However, the other expenses were treated, that is, also, I take it, some of those were allocated? A. Yes, there are a great many expenses that don't change across the year. In other words, the same each week, so they would be—we just used that average expense, which was usually changed about once a week, as I remember it.

Q. However, the allocations that were made do not appear in anything you have on the sheet? A. It does not.

Q. Can't tell from that. Then you have got over in this final column under "Remarks," I see, the statement "Advertising allowance." You have some red figure under this. Can you tell me what those are? A. Yes, when we paid film rental, you will notice these key numbers along here.

Q. No, I didn't ask about those. Under "Paid"
653 you have green letters there. What do those mean?

A. That symbolizes the week in which the film rental was paid. You will notice we paid the theatres that opened here on the 19th—no, 9th, I am sorry—we paid them under the letter D. Then the following week, when we played E—

Q. What did D mean? A. That simply represented the week. Every 26 weeks you switch back.

Q. What week does D represent? A. I am not sure whether we changed over in the first of the year or maybe we may have been out a few weeks, since we were on a 53-week from time to time. We would go through the alphabet twice a year. So this D would represent a payment made, on my rough estimate, would be made February 1st or maybe the second week in February, that we would have made, and then the third week in February, therefore, have paid E.

Q. Go ahead with your explanation? A. We were given an advertising allowance from the distributor in this case

of $2,000—$2,040. The $40 represented sales tax as it relates to the film rental and advertising, and we would deduct that in making the second payment.

654 In other words, when we made final payment for the run, we would deduct the credit allowed us under the deal that was made.

Q. Although you show that figure in red, that is a figure received, paid by the distributor to you, is that right? A. Yes, sir, you could put it that way. It was actually deducted from his film rental but he could have sent us a check.

Q. He paid. A. Yes.

Q. I notice you have a heading, "Second Weeks and Moveovers." You have some figures under that. Can you tell us what that is? A. This term was used for in-town and out-of-town theatres, and actually in New York it would be broken down between five-day run and two-day run rather than in first and second weeks. Usually you didn't have second-week playoff in New York.

Q. The same data as to these moveover weeks appears in this second set of columns which you have in the first set there, is that right, under "First Week"? A. Yes, it is the same information.

Q. You gave us, I think, the date when this picture went into the circuit. That was what? Destination

655 Moon. A. I believe we agreed it was 1951. I don't have it marked on here.

Q. January 9, 1951, I think you gave the date. Can you tell us there when that picture Destination Moon played first-run? A. No, sir. There is nothing that I have here with me here that would give that.

Q. Can you get that first-run data for us?

Mr. Wright: We will be adjourning for lunch. I don't think we will be able to finish with this witness until after lunch.

The Court: Get it over the lunch period.

Mr. Wright: We would also like to have, if it is avail-

able, the first-run play dates of all those pictures that you have listed in the sheet you have in front of you.

Mr. Raftery: You got all those dates, Mr. Wright, in some exhibit you put in.

Mr. Wright: I, unfortunately, cannot testify.

The Court: All right; we will recess until 2 o'clock.

(Recess to 2 o'clock p.m.)

656 AFTERNOON SESSION

ROBERT L. MILLER resumed.

Cross-Examination continued by Mr. Wright:

Q. Mr. Miller, during the recess did you find the first-run playdates on Destination Moon, the picture that is on your RKO Exhibit C? A. We did not have that, no.

Mr. Raftery: We never had them, Judge. The only source you could get them from would be Eagle Lion or the theatres which played the pictures. We didn't play it.

Q. Do you know, Mr. Miller, how much time would ordinarily elapse between the first run Broadway and these pictures you put into the RKO circuit? A. No, I am not in a position to answer that.

Q. You don't have any idea as to what a normal lapse of time would be? A. No, I wouldn't want to hazard a guess.

Q. And you don't know whether the effect of holding up the playing on the circuit would be injurious to the box office performance of the picture or not; is that right?

A. Well, my opinion on that phase of it wouldn't
657 be worth very much. I have an opinion, but it wouldn't be worth much.

Q. You know enough about the business for you to know that you do, to the extent that you delay the exhibition in your circuit of any picture that has had a successful run on Broadway, you to that extent lose some of the advertising value you would otherwise get from the first run; isn't that so? A. I would agree with that as a general

statement. You dissipate some of your original advertising if you do not play within a reasonable length of time.

Q. This picture Destination Moon, it appears from the document in evidence here, had a first run at the Mayfair Theatre and paid a rental of $62,800.

That Mayfair, that is one of the theatres you put on the schedule you offered here at first-class, isn't it? A. Correct, sir.

Q. And if it appeared from other evidence that that run at the Mayfair ended on August 14, 1950, it is a fact, isn't it, that by not playing that picture in the circuit until January 1951, it would not under those conditions perform as well at the box office on the circuit play as it
658 would if it had been put into the circuit right after the first run, would it?

Mr. Raftery: That is objected to. It is not proper cross-examination. Further, the witness has testified he is not competent to give an opinion on that.

The Court: I will overrule the objection.

If the witness is competent to give an answer, he can give it. If he isn't competent, he can say that. A. I would rather not answer that question because I am not enough an authority on that phase of it.

Q. You have been in the business quite a while in the office. What did you say your position was? A. I was the office manager, which related to personnel basically and also the film payments.

Q. And you don't know enough about those payments to know what the effect on the rentals that can have—that kind of playoff in the circuit would have? A. It would only be my opinion, and I wouldn't value it too highly.

Q. We are not interested in value. Just give us your opinion for what it is worth.

The Court: The witness said he hasn't any
659 competent basis of giving an opinion from his standpoint, as I understand it.

Mr. Wright: All right.

Q. There is in evidence here as Plaintiffs' Exhibit 8 the contract or contracts for the two pictures that you have shown there on that RKO Exhibit C-5. Will you turn to that, please. A. C—

Mr. Raftery: C-4.

A. We don't have a C-5. We have a C-4. This relates to Canon City and Raw Deal?

Q. That is the one. A. That is C-4, the way it is marked.

Q. The contract in evidence for Canon City says that the rental terms are to be—just says number of days—5, and the terms, 25 percent of the gross receipts to $230,000 and 50 percent thereafter. It is understood, however, that the Colonial and Alhambra Theatres, while included in this deal, shall pay five percent less per theatre than paid by the rest of the circuit. This picture plays for seven days, terms for the sixth and seventh days shall be 20 percent of gross receipts.

You have, as to that picture, a number of
660 separate rentals listed there, for each of those theatres on the schedule, haven't you? A. That's right.

Q. And can you tell me, first, how this $230,000 figure that I first read you—that was what you call a split figure? A. That's right.

Q. How was that split figure allocated among the various theatres in the circuit that played the picture? A. My recollection would be that it was not involved in the spreading. You would calculate the film rental for the 34 theatres; in other words, you would take the whole of those 34 theatres. Then, after you had how much film rental those theatres were going to pay, you would allocate that film rental to each theatre on the basis upon which that theatre had grossed of the total gross that went into the calculation.

Q. There is no theatre-by-theatre split figures on here. In making that calculation you used some figures of your

own, did you, or some that appear on the RKO theatre book?

Mr. Raftery: That is objected to. He just answered the question exactly the opposite to what
661 he is asking him now.

The Court: I don't understand what you mean by your question, frankly. I don't know whether the witness does. What was that question?

Mr. Wright: I am trying to find out how the allocation that appears on his schedule there was made as among the theatres which played the picture.

The Witness: I said—

The Court: I think the witness answered that they took the gross rental and then they divided that among the theatres in proportion to the gross receipts of the theatres.

The Witness: Yes.

Q. Did you use the same split figure for each theatre or a different one? A. Each theatre would gross a different amount, so each theatre would be billed on the basis of what it grossed.

Q. That would be on what, just 25 percent or a percentage— A. It wouldn't be 25 percent because it earned something beyond 25 percent for the five-day run because, from what I can hear, there was $255,000 in gross before the Midway—no, that includes two others, so I can't
662 give the exact amount that it earned—but it had to earn somewhat in excess of 25 percent. It would earn something like 26 percent or 26 point something, and that would be an overall earning for the circuit.

Q. I understand that. Now I am trying to determine how you got the percentage figure for each of the theatres. I understood you to say that each theatre might pay a different percentage of the gross receipts under this deal, is that right? A. It wouldn't be different percentage of the gross receipts. It would be—after you had your total film rental for the 34 theatres, you allocated each theatre

in accordance with the amount that it had grossed of the total gross.

Q. Oh, then, I see. You would allocate back the split figure there in accordance with the various grosses the theatres had? A. That's right.

Q. And then compute your percentages on that.

Mr. Raftery: I submit that counsel is unfair to the witness. He hasn't testified to any allocation of split figures. He has only testified to the allocation of film rental.

The Court: That was why, frankly, I didn't
663 understand what it is all about. What difference does it make, Mr. Wright?

Mr. Wright: I am just interested in how the other figure—

The Court: You may be interested, but what relevance does it have to the issue in this case?

Mr. Wright: I think it shows, your Honor, in these circuit deals of this kind that actually there is no contract rental or the rental that goes—what a particular theatre may pay is a matter which really the circuit determines and something which the distributor has, normally, no opportunity to.

The Court: I assume that is so. Isn't that inherent in the whole situation?

Mr. Wright: That is the only point I wanted to make.

Q. This record that went into evidence here as RKO Exhibit B, that was a list of these screenings of Eagle Lion pictures that you said were, I think, prepared for this lawsuit. A. Yes, sir.

Q. That was taken off some original record, as I understood you, which contains the records of the pictures
664 screened for all distributors. A. Yes, sir.

Q. What period does that record cover? A. Well, if I am not mistaken, it goes to about 1940 or 1941. In other words, the book that we are now using dates from about the '40 season or '41 season. I am not sure which.

Q. That goes back to 1941? A. Yes.

Q. If we wanted to cover, let us say, the period 1946 through 1950, is that in one volume or is it that easy? A. No, sir. It is kept on looseleaf sheets and, as you screen a picture, you add it to the page, and it isn't kept by distributor, it is kept by the title of the picture. In other words, Sudan would appear under the S's and chronologically then under the date that it was screened.

Q. It does, however, show the names of the distributors on this, doesn't it? A. Yes, the names, as we have them abbreviated.

Q. You could tell by examination of the original record, for example, how many Paramount pictures, say were screened during that period? A. Yes, sir. When
665 you say period, as I say, this book never ends, if you know what I mean.

Q. I was just addressing myself to the period 1946-1950. A. 1946-1950. Then you could take the book for those years.

Q. Could you produce that conveniently? If not—we would like to look at it.

Mr. Wright: We have no objection to this going in, if we can see the book.

The Court: I think it is in evidence.

Mr. Raftery: It is in.

The Court: You have got a question to the witness?

Mr. Wright: That is all the questions I have to the witness.

I would like to ask Mr. Raftery to either—

The Court: Don't ask him anything. I mean, you may ask the Court. Let us not have a discussion between counsel going on here.

Mr. Wright: We would like to have the book, if it can be conveniently produced.

The Court: I suppose if Mr. Raftery won't produce it, you can subpoena it. You take it up with Mr. Raftery.

666 Is this witness excused, then?

Mr. Wright: We have nothing more.

The Court: No further questions?

All right.

I still have some document here which is marked for identification. Any objection to that?

Mr. Wright: No, we have no objection.

The Court: Then that is marked in evidence. That is what?

(Defendant RKO Exhibit C for identification received in evidence.)

Mr. Wright: I might say, your Honor, we have a standing objection to the receipt of exhibits without even a copy to ourselves. I think we should be provided with copies.

The Court: Of course that is not a legal objection, I take it. It may be an objection that goes to the book of etiquette, and I should think—

Mr. Wright: I think there is a little more that etiquette involved. I think we would be able to operate more efficiently if we could at least have a copy of the tables and schedules.

The Court: Yes.

Mr. Raftery: What ones haven't you got?

666a This is the only one. We will try to have a photostat made and get it to him.

The Court: All right. That will help.

(Witness excused)

24224

No. [redacted] 271

APPENDIX TO APPELLANT'S [illegible]

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Civ. 61-166

EAGLE LAW SUCCESS, INC., EAGLE LAW FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC., *Appellants*,

v.

LOEW'S INC., BEIO TREASURY, INC. and BEIO FILM BOOKING CORP., *Appellees*.

Volume II

(Pages [illegible] to [illegible])

UNITED STATES COURT OF APPEALS
FILED
SECOND CIRCUIT

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INDEX

	Vol.	Page
Summary of Docket Entries Pursuant to Rule 15(b)	I	1
Complaint	I	4
Supplement to Complaint	I	15
Transcript of Trial	I	17

TESTIMONY

Witnesses for Plaintiff

MacMillen, William C., Jr.		
Direct Examination	I	59
Cross Examination	I	113
Re-Called:		
Direct Examination	I	340
Gross, Norman		
Direct Examination	I	127
Preliminary Cross-Examination	I	141
Direct Examination Resumed	I	145
Preliminary Cross Examination	I	177
Direct Examination Resumed	I	184
Cross Examination	I	187
Cross Examination Resumed	I	231
Re-direct Examination	I	239
Re-called:		
Direct Examination	I	288
Cross Examination	I	296
Re-direct Examination	I	312
Re-cross Examination	I	316
Re-called:		
Direct Examination	I	351
Cross Examination	I	358
Friedberg, Saul		
Direct Examination	I	224
Young, Charles F.		
Direct Examination	I	229
Peoples, John		
Direct Examination	I	257

	Vol.	Page
Kaplan, Leon		
Direct Examination	I	321
Cross Examination	I	335
Agnew, Neil		
Direct Examination	II	535
Cross Examination	II	542
Re-direct Examination	II	543
Witnesses for Defendant RKO		
Miller, Robert L.		
Direct Examination	I	368
Cross Examination	I	381
Schwartz, Sol A.		
Direct Examination	II	398
Cross Examination	II	416
Re-direct Examination	II	437
Re-cross Examination	II	460
Witnesses for Defendant Loew's, Inc.		
Vogel, Joseph R.		
Direct Examination	II	463
Cross Examination	II	479
Re-direct Examination	II	505
Re-cross Examination	II	506
Youngstein, Max E.		
Direct Examination	II	507
Cross Examination	II	514
Downing, Russell V.		
Direct Examination	II	521
Opinion of Judge Archie O. Dawson	II	555
Notice of Appeal	II	582
Judgment Dismissing Complaint	II	583
Amended Notice of Appeal	II	584

EXHIBITS

	Identified Vol.	Identified Page	Received Vol.	Received Page	Text Vol.	Text Page
Plaintiff's Exhibit 1—Final Decree in Paramount Case against Loew's, Incorporated, Warner Bros. Pictures, Inc. and Twentieth Century Fox Film Corp.	I	48	I	57	II	585
Plaintiff's Exhibit 2—Findings of Fact in Paramount Case, filed February 8, 1950	I	48	I	362	II	594
Plaintiff's Exhibit 5—First & Second Neighborhood Run Theaters Operated by Loew & RKO Circuits in Boroughs of Manhattan, Brooklyn, Bronx & Queens, 1945-1950	I	75	I	171	II	645
Plaintiff's Exhibit 9—Division of Eight Major Distributors' Product Between Loew & RKO Metropolitan Circuits 1948-49 as Shown by Film Rentals Paid by Circuits	I	84	I	184	II	646
Plaintiff's Exhibit 10—Comparison of Eagle-Lion Revenue with Revenue of Major Distributors from Subsequent Run Theatres in Metropolitan New York	I	87	I	257	II	647
Plaintiff's Exhibit 22—Distribution of Film Rental Paid by the RKO and Loew Metropolitan Circuits	I	184	I	185	II	648
Plaintiff's Exhibit 26—Summary, Film Rental, Ratios to National Less N.Y. Metropolitan Plus N.Y. First Run	I	351	I	352	II	649
Plaintiff's Exhibit 30—Exchange of Correspondence in August 1948 between Arthur Krim of Eagle-Lion and Joseph Vogel of Loew's, Inc.	II	504	II	505	II	650
Plaintiff's Exhibit 32—Data as to Circuit Rentals on Eagle Lion Pictures which played on Loew or RKO Circuits	II	544	II	545	II	653

	Identified Vol.	Identified Page	Received Vol.	Received Page	Text Vol.	Text Page
Plaintiff's Exhibit 33—Data as to Circuit Rentals on 96 Picture Sample Furnished by 8 Major Distributors and RKO and Loew Circuits	II	545	II	545	II	655
Plaintiff's Exhibit 34 – Schedule Showing Interval Between First Run Broadway and First Neighborhood Run on all Eagle-Lion Films which Played Long Half on RKO or Loew Circuit	II	545	II	545	II	658
Excerpt from Printed Record of Stenographer's Minutes in United States of America v. Paramount Pictures, Inc. et al., Equity No. 87-273, United States District Court, Southern District of New York, November 8, 1948					II	659
Excerpt from Appendix to Brief for the United States of America in the Supreme Court of the United States, October Term, 1947, Nos. 79-84 (Appeal and Cross Appeal by the Government and the Defendants, Respectively, taken in United States v. Paramount Pictures, Inc. et al.) Government Exhibit No. 424					II	664

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v.

LOEW'S INC., RKO THEATRES, INC. and RKO FILM BOOKING CORP., *Appellees.*

APPENDIX

Volume II

(Pages 397 to 664)

667 **Sol A. Schwartz**

called as a witness on behalf of the defendant RKO, being first duly sworn, testified as follows:

Direct Examination

By Mr. Raftery:

Q. Mr. Schwartz, where do you reside? A. 145 Central Park West, New York.

Q. What is your present position with the defendant RKO Theatres? A. I am president of RKO Theatres.

Q. How long have you been president? A. Since January 1, 1951.

Q. Will you tell his Honor when you first started with the old Keith Company, which was the predecessor of RKO? A. I have been with the company and its predecessors since 1922.

Q. Briefly tell us, starting with the beginning, your first job and coming down to being elected president? A. Well, when I first started with the company it was in a secretarial position and then—

Q. In a theatre? A. In a theatre.

Q. What theatre? A. In the Alhambra Theatre
668 up on 126th Street. From that position I moved to an assistant manager's position, and then to a manager's position, and then to a district manager, and then to a zone manager, and then to the position of vice-president.

Q. When did you become a vice-president? A. In 1946.

Q. That is about the time Eagle Lion was born, isn't that about right? A. Well, that is the time we are talking about.

The Court: That is not a matter of his knowledge, probably. That is just hearsay.

Q. Were you in charge of theatre operations in the metropolitan area when you became vice-president? A. Yes, I was.

Q. You continued in charge of theatre operations in the metropolitan area up until you were elected president? A. I continued in charge of theatre operations beyond that time, too.

Q. But I mean, specifically, you were general manager— A. That is right.

Q. (Continuing)—and vice-president in charge of
669 theatre operations for the whole RKO operation?
A. That is right.

Q. And then on January 1, 1951, you were elected president? A. That's right.

Q. And you have been president ever since? A. Yes, sir.

Q. Now, when you became vice-president in charge of theatre operations, did RKO or its predecessor companies operate some theatres in the metropolitan area? A. Yes, sir.

Q. Did it operate any first-runs on Broadway when you came in? A. RKO Theatres did not operate any first-run theatres on Broadway.

The Court: Any affiliated company? I am a little lost in this RKO Theatres. Are we dealing with one group?

Mr. Raftery: One group.

The Witness: The company or its affiliates did not operate.

The Court: I just wanted to make sure.

By Mr. Raftery:

Q. You did have a theatre uptown called the
670 Palace in that area? A. That is right.

Q. And that operated on different policies from this 1946 down through 1950; isn't that a fact? A. That is right.

Q. It played second-run? A. It played second-run, it played—

The Court: It was a vaudeville house?

The Witness: It's a vaudeville house.

I might correct that, from 1946 to 1950, taking the four or five-year period. In 1949, in May of 1949, the theatre returned to a vaudeville policy and at that time the theatre did play first-run pictures with vaudeville.

Q. Now, in Brooklyn, for example, do you have a first-run in Brooklyn? A. We have a theatre which plays a run prior to the other theatres in Brooklyn, yes, sir.

Q. And that is what theatre? A. The Albee Theatre.

Q. During this period, you played what are called first neighborhood runs in Manhattan; isn't that a fact? A. That's right.

671 Q. And also in the Bronx? A. That's right.

Q. And also Westchester? A. That's right.

Q. Can you tell us what neighborhood first-run theatres you operated—and by "you" I mean RKO—in Manhattan during 1946 to 1950? A. Well, we operated the RKO 23rd Street—I will do these by name—RKO 23rd Street, the RKO 58th Street, the RKO 86th Street, the RKO 125th Street. We operated the Coliseum, the Hamilton Theatre, the Regent Theatre, the Alhambra Theatre, and I think for a period in there the Colonial Theatre.

Q. How about the 81st Street? A. The 81st Street Theatre we had at that time.

Q. So in the whole of Manhattan you had 10 neighborhood first-run theatres maximum during this period? A. I haven't got it broken down. I don't think it was 10. I think it was about eight.

Q. I included the Colonial. Did you also operate a theatre called the Jefferson during 1946 to 1950? A. Yes, we did.

Q. And what run did you operate that theatre? A. That was on a second or subsequent neighborhood run.

672 Q. And that was on 14th Street? A. 14th and Third Avenue.

Q. Near the Academy of Music? A. That's right.

Q. The Academy of Music was operated during this

period as a first neighborhood run theatre, was it not? A. That's correct.

Q. And you did not operate that? A. No.

Q. Who operated it? A. Skouras Theatres.

Q. In the Bronx what theatres did you operate on a first run neighborhood run from 1946 to 1950? A. We operated the Fordham Theatre, we operated the Royal Theatre, we operated the Franklin Theatre, we operated the Chester Theatre, operated the Castle Hill Theatre and for a period of this period I would say the Pelham Theatre.

Q. Did you operate the Marble Hill? A. Well, the Marble Hill is in Manhattan. I think there is always a question—I should include the Marble Hill with the Manhattan group.

Q. Even though it is geographically in the Bronx? A. Well, that has been a matter of dispute between the
673 borough presidents.

Q. At any rate, we will add the Marble Hill.

These four that were mentioned by Mr. Gross yesterday in Westchester, you operated those four? A. Yes, sir. One in New Rochelle, one in White Plains, one in Yonkers and one in Mount Vernon.

Q. And they generally played an availability equal to the first neighborhood runs in Manhattan and the Bronx? A. Essentially so, yes.

Q. Did you operate theatres in Queens? A. Yes, we did.

Q. What theatres did you have in Queens? A. We had a theatre at Richmond Hill, we had a theatre in Flushing, we operated two theatres in Far Rockaway, we operated a theatre in Jamaica.

Q. That would be the Alden? A. The Alden Theatre, that's right.

Q. In Brooklyn you had your first-run Brooklyn at the Albee; is that right? A. That's right.

Q. And there were other downtown first-run theatres in Brooklyn besides the Albee during this period? A. There were.

674 Q. What were they? A. There was the Metropolitan Theatre, there was the Fox Theatre, there was the Paramount Theatre. I am not certain about whether the Strand ever operated as a first-run.

Q. The Brooklyn Strand was operated and closed during this period? A. Yes. I just don't recall.

Q. You had some first neighborhood runs in Brooklyn; isn't that a fact? A. Yes, we did.

Q. What were they? A. We operated the Orpheum Theatre, the Prospect Theatre, the Kenmore Theatre, the Dyker Theatre, the Tilyou Theatre, the Bushwick Theatre, the Greenpoint Theatre, and the Madison Theatre.

Q. Eight. Now, those were all the first neighborhood runs you had in Brooklyn.

Did you have any second neighborhood runs in Brooklyn during this period? A. Again for a period of time within this period, we operated a theatre called the Shore Road Theatre up at 86th Street.

675 Q. Near Fourth Avenue? A. Between Fourth and Fifth.

Q. In the Bay Ridge or Bensonhurst section? A. In the Bay Ridge section, Dyker section.

Q. And that operated on a second-run basis, did I understand you? A. On a subsequent run after first neighborhood run basis.

Q. You operated no theatres on Staten Island? A. No.

Q. And you operated none in Nassau? A. None.

Q. And none above White Plains in Westchester? A. Not in Westchester, no.

Q. During this period, Mr. Schwartz, when you were exhibiting on first neighborhood runs in these RKO theatres, were there other theatres in Manhattan besides the Academy of Music showing generally the same pictures that you were showing in your first-run theatres? A. Yes.

Q. Can you tell us those theatres as best as you can

from memory and the operators? A. And the what?

676 Q. And whoever operated them, if you knew. A. During this period and some part of this period, the Academy of Music played first neighborhood run. The theatre was operated by Skouras. The Beacon Theatre played first neighborhood run and that was operated by Brandt.

Q. How about the Riverside? A. The Nemo Theatre up at 110th Street played and that was operated by Skouras; and the Riverside Theatre played and that was operated by Skouras. That is all I recall at the moment.

By the Court:

Q. Did they play the same pictures at the same time you did? A. Essentially so, yes, sir.

By Mr. Raftery:

Q. In the Bronx, were there any theatres that played, we will say, day and date the same pictures that you generally played in your neighborhood houses? A. Yes. The Earl Theatre operated by Joelson played date and date, the Luxor Theatre operated by Joelson played, the Crotona Theatre operated by Skouras played day and date, the Park Plaza operated by Skouras played day and

676a date, at times during this period two theatres called the Melba and the Laconia in the Bronx played day and date. I mentioned the Pelham before as being operated by RKO. At one period during this entire period it was operated by Skouras and also played day and date. That is all I recall at the moment.

677 Q. Were there any in Brooklyn that played day and date with your theatres, if you recall? A. The Carlton Theatre operated by Brandt played day and date, the Savoy Theatre played day and date, the Stone Theatre, Stadium Theatre—the Savoy Theatre was operated by Frisch & Rinzler. The Stone, the Stadium and the Embassy Theatres played day and date at some time

during this period, operated by Frisch & Rinzler; the Marine Theatre and the Midwood Theatre and the Kingsway Theatre played day and date, and I think for a time the Avalon Theatre played day and date. Those theatres were all operated by the Century Circuit.

I think also the Ambassador Theatre and the Congress Theatre at some period within the total period played day and date, operated by Frisch & Rinzler.

Q. In Queens, did any theatres operated by other than RKO play day and date the same pictures you generally played? A. Century had a theatre in Floral Park that played day and date.

Q. How about the Queens in Queens Village? A. I am just trying to get them. Floral Park, Queens
678 Village, both operated by Century. I think there were a few others. I just don't recall them.

Q. Mr. Schwartz, you still supervise and you did supervise during this entire 1946 to 1950 period the management and operation of your theatres? A. Yes, sir.

Q. Can you tell us generally what supervision and what management you gave the theatres and how they were generally operated during this period? A. Well, the main essential in theatre operation is—

Mr. Raftery: Your Honor, would it be all right if I sat down?

The Court: By all means.

Mr. Raftery: I have a bad foot.

A. The main essential in theatre operation, in any theatre operation, is the performance, and we start with that—we naturally start with a building, which is an auditorium. We try, from a physical sense, to keep that or make that as attractive and inviting as possible, and from time to time renovate and rehabilitate and maintain the theatres for the patrons' comfort. However, as I said, the essential or the main essential for operating the
679 theatre business is what you are able to give the patrons who you are seeking to attract as enter-

tainment, and to that end we have what we term the proficient booking department, consisting of several people in very responsible positions under my direction buying films, and in conjunction with other people in the department, booking films, and the task is huge in that many pictures are looked at by not only the film department but members of the advertising department, members of top management, and decisions are made, again under the direction of top management, as to the booking of these pictures, or attempts to buy these pictures or to negotiate for these pictures, keeping in mind when pictures are available and under what terms and conditions they can be bought and how we can make money by playing certain or particular pictures in our theatres.

The process of screening the pictures was somewhat described this morning. Screenings go on daily and these screenings take up an important part of the day's work, but they are a very important part of the work and the men who are directly responsible for the booking and buying of pictures attend these screenings except if one happens to be ill or on vacation.

680 There is generally a fair representation of those people who would participate in the decisions as to pictures to be bought and sought at those screenings.

As I said before, the pictures are screened and we are solicited by film companies as to buying pictures, as to dating pictures, and there is a regular series of negotiations and back and forth discussion as to whether we will buy, whether we won't buy, how much we will pay and so forth.

The determining factors of whether a picture should be bought are gone over very carefully by the people who are experienced by trial and error of many years as to what type of pictures appeal to certain neighborhoods and appeal to the largest percentage of people that we think we can attract to our theatres.

We operate theatres outside of New York City, and

we have found again by trial and error that certain pictures have certain appeal geographically, certain pictures have certain appeal religiously, certain pictures have appeal because of their story content, such as westerns, such as society pictures, such as musical pictures, such as action pictures.

We carefully study and evaluate what we have
681 seen and try to come to a decision on the basis, as I said before, of what is available and what we need and what we think will produce the best revenue for the theatre and for the company, and proceed to try to get that picture or proceed to pass up the picture that we don't think fits our needs.

The Court: I think that gives a pretty good picture.

Q. Mr. Schwartz, you mentioned geographically. We have had a picture Tulsa referred to several times here. Is that one of your geographical pictures? A. Well, a picture like Tulsa is a picture that we just know, and we know from our experience, does a better proportionate business in certain areas of the country than it will do in New York. I think the figures will show that if they can be talked about or presented here. It is only natural that a story of the oil country of Tulsa is going to go fairly well around Tulsa, the oil territory, Dallas, cities like that, and, conversely, I imagine that a dressy picture—and if you would like me to describe a dressy picture, I will put it in terms of a society story picture—might do a little better in the bigger cities than it would do
682 in Tulsa.

Pictures of the Ma and Pa Kettle vintage. Ma and Pa Kettle was a series of pictures produced by Universal and which did on a national basis a fantastic gross which surprised everybody in our area, and we played pictures like Ma and Pa Kettle and failed with them. Yet the total returns on Ma and Pa Kettle pictures are comparable to some big and well known productions with much bigger stars than Marjorie Main and Percy Kilbride.

Q. How about pictures like the Tarzans? A. There is a particular group of those pictures which do business in areas. The Tarzan series—and, incidentally, I might say that any series in any area after a while starts a road of deterioration. We very seldom have seen a series picture build. You might sustain for one or two or three, but you get into a series of any type of picture, and you would start to go downhill.

The Tarzan pictures were produced by a man named Lesser and released through a company with which my theatre company was integrated for many years, and we—I was in a position to know that the Tarzan pictures did very well on a national basis and it was one of
683 serious bones of contention that I had in negotiating for a Tarzan picture—when I say "I" I mean our company—had negotiating for a Tarzan picture, in the New York area, because we constantly had it thrust in our face that these Tarzans are great box office pictures.

Well, we played them and nobody came to see them. They had kid appeal. We got down to the point in the Tarzan series where we almost tried to limit them to a Saturday matinee showing or a weekend showing on just the matinees. There was just no appeal in this area for that type of picture.

That is true with the Lum and Abner series a number of years ago, which was one of the most popular radio programs. I know from my experience a Lum and Abner picture never played New York, and it was produced by the company called RKO, which we were part of, but we never played it.

Q. Did you play these Tarzans as second features, if you ever did play them? A. We finally played the Tarzan pictures as a second feature, yes.

Q. And even though you, of your own knowledge, knew those picture nationally would gross over a million
684 dollars. A. A number of the Tarzan pictures that played on a national basis grossed well over a million

dollars, and they would wind up on the lower half, we described it as—on the lower end of a long half and sometimes even on the lower half of a short half, but they never got any prominent playoff in New York, and the few first-run theatres not operated by us who attempted to play the Tarzan pictures, the records will show that the results were horrible in this New York area.

Q. Does that same barometer or yardstick apply to the so-called westerns in series so far as the New York area is concerned? A. Yes. The westerns, as we have been talking about them in relation to Eagle Lion and in relation to the Starrett pictures of Columbia or the Roy Rogers pictures of Republic——

Q. How about the Tim Holts of RKO? A. The Tim Holts of RKO. There is another one I can't think of.

Q. Gene Autry? A. Gene Autry. The westerns, as those westerns, never did well in the City of New York and yet some of them I know—some of the Gene
685 Autrys or the Roy Rogers came up with fairly good grosses on a national basis, and constantly we were again faced with a problem as to why we wouldn't play a western picture.

I recall very plainly that it was Christmas week some years ago and we had a very fine musical booked in, and at the constant persistence of people to try something, we tried a western and nobody came. We just had a miserable Christmas week. We thought that the kids would come. It seems that even the youngsters, the real kids, never came out for that type western in this particular area.

Q. But there are areas that you have operated in where they do something? A. There are areas in the country where the need first for quantity and then for type of picture is particularly pertinent to that area, so that a Roy Rogers or a Charles Starrett or possibly some of the westerns that we talked about in Eagle Lion must have done fairly well in some areas than this area.

Q. There has been some evidence here about Abbott & Costello and The Noose Hangs High.

Have you made a study of your experience with these Abbott & Costellos during this 1946 to 1950 period?

686 A. Yes.

Q. Do you need any of your records? A. No, I think I can recall.

Q. You tell us about Abbott & Costello. A. The Abbott & Costello pictures like, as I said before, all series pictures, were on a decline in this particular period.

The Abbott & Costello pictures first came into being in, I think, around 1940 and, as is general with a series of this type, their first few releases do well and it gets to the point of the routine of who is on first and the money-lending bit runs out and there is just a thin thread of story, there is just a thin potential or a narrow potential for these fellows to show their talents in, and after a while you do exhaust that kind of a talent, meaning Abbott & Costello's.

The same thing happened with the Ritz Brothers; to an extent that happened with the Andy Hardy series. It is happening a little apparently currently with the Martin & Lewis pictures.

The desire on the part of people to capitalize on the strength of an up-and-coming team like Abbott & Costello gets them to make a lot of them. After

687 they make a lot of them or a number of them they start—it is like eating a lot of steak. You don't enjoy the sixth as much as the first.

When we came to this period, we played a picture called Buck Privates Come Home, but it was not brought out that Buck Privates Come Home played in 1947 and, I think, your Honor, that the playoff and the dates of when these pictures played and when they were available is vitally important to this story that we are telling because in 1947 the big bulk of the soldiers who were overseas were on their way home or had already come home and

we had ten million GIs to whom a title like Buck Privates Come Home is a darned good title and would be appealing and very timely, just as years previous when the first draft went into effect the same company, with the same people, made a picture called Buck Privates, and one of the most successful pictures we ever played was a picture called Buck Privates, because this was a household word at the time, buck privates, and so we played Buck Privates Come Home.

688 Q. By the way, what did you play it with, if you remember? A. I was coming to that. We played Buck Privates Come Home, and that was in 1947. Now, we found from our experience and from our playoff of the pictures of the Abbott & Costello vintage that, from the grosses that they were doing nationally, when I say "nationally" I mean in the theatres which we operated away from New York, that interest was getting less and less and less, and a picture like the Noose Hangs High, well, we played the picture in October, 1948, that is, about a year and a half after, a year and some months after the Buck Privates Come Home, in between there was another Abbott & Costello picture, well, the more you had, the less attractive it became, and at the time that we played Buck Privates Come Home, we played with it a picture called Temptation.

Now, Universal produced this picture and it was quite a costly picture and they wanted us to play Temptation, but we didn't see any box office strength in Temptation. It was an expensive picture, it was well mounted, but we played it with the Abbott and Costello Buck Privates Come Home, and it made up a show which, on showman-

689 ship, might appeal to the various segments of the population. Buck Privates Come Home would appeal, as I said before, to the rough and tumble kind of fellow while this comedy on the raw subject Temptation would have an appeal to, well, to a fellow who didn't know what Temptation was or didn't know what the story content was.

The Court: The people who stayed home.

The Witness: Yes; and we put the show together and that is the way we played.

The Court: I think we understand.

Q. What about the next Abbott and Costello? You have had Abbott and Costello Meet Frankenstein? A. Yes.

Q. When did you play that? A. We played that a month—We played that in September, 1948. Abbott and Costello Meet Frankenstein was about the last good idea that Universal had of what to do with Abbott and Costello. They had run out of sending them to Hollywood, Miami and Foreign Legion, and having Buck Privates, they came up with an idea——

The Court: All right; I think we have the point.

Q. This Noose Hangs High you played as a second feature in October immediately after Frankenstein?

690 A. That is right.

Q. What picture did you play it with? A. We played it with Life With Father.

Q. That was an all-color picture made by Warner Bros. and based on the Broadway play? A. That is right.

Q. And had a lot of stars? A. That is right.

Q. The Noose Hangs High, you had played that previously in Cincinnati, had you not? A. I mentioned we played the picture away from New York and watched its results and it didn't compare like Buck Privates Come Home, and certainly didn't compare with the picture we had Abbott and Costello Meet Frankenstein, and we were a little wary of the picture, of its appeal and its strength, and we bought it on a show that we thought at that time would serve our purpose.

Q. In arriving at that decision as to booking Noose Hangs High on that basis, did you consult anyone other than your own people in your own organization? A. No one.

691 Q. And you—and Eagle Lion? A. Well——

Q. Your buyers discussed it? A. I didn't consult. The deal was made for the picture.

Q. You played a Canon City and a Raw Deal, I noticed, and had a rather successful engagement of those two in combination on your RKO circuit? A. Yes, sir.

Q. Did you do any special exploitation job or anything in order to put those pictures over? A. Yes, I think that when we showed these pictures they both lacked—they were practically devoid of any star value, per se, star value in the sense of what was then recognized as stars with advance box office appeal. I think the biggest star in the two pictures was Scott Grady.

The picture itself Canon City was very timely. The picture told the story of an actual incident that occurred and was a blood and thunder action picture, prison escape, and we finally played the show Canon City and Raw Deal, and I would like, may I—we felt that we could play this show very profitably, and we bought the show and had

692 a special meeting of our men here in New York, because we felt this was the kind of show that a big city like New York, liking this type of picture, would go for, and we had a special campaign, the kind of campaign that only lends itself to the showinng of pictures of this type.

We actually offered a prize. I think we gave something like $300 in prizes to be distributed among our managers for the best job done, and if I may take the liberty of being immodest about it, I think that the RKO circuit at that time did an exceptional job in selling two pictures of just substance matter rather than normal picture appeal with stars, and we came up with a good result.

I have here a photostat of a prize awarded to the manager of the Alden Theatre, who was one of the winners, $25, honorable mention. I think the first prize was $100, and the manager who has that isn't in New York, so we couldn't get that. But the advertising on the picture—

this is the kind of ad we ran on the picture, far in—much greater size than the ad which we normally used to sell our then current pictures.

There were all kinds of circulars and heralds and construction bulletins from our advertising department
693 as to all these ideas to be utilized in the selling of this double-feature attraction.

I personally visited—I personally visited—in company with my assistant, every theatre in New York City at that time during this engagement for the express purpose of determining who we thought was—had come up with the best job.

Q. When this Canon City played, at that time you played the Manhattan, Bronx and Westchester theatres day and date on that particular picture? A. That is right.

Q. On those two pictures? A. That is right.

Q. And then at a later—and immediately following—— A. We played the same show in the Brooklyn and Queens district.

Q. In Brooklyn and Queens? A. Yes.

Q. I notice, while you were playing this particular pair of pictures in Manhattan and the Bronx, you were playing Gary Cooper and Ann Sheridan in Leo McCarey's Good Sam picture? A. Yes.

694 Q. As contrasted with those two, this is a picture with star value and with a great producer, is that right? A. Oh, yes.

Q. While these two were bread and butter pictures without any great names but required exploitation? A. The fact is that on the one picture we don't advertise any name; on the second picture we advertise Dennis O'Keefe, Claire Trevor and Marsha Hunt, none of which three are in any way in the category of a Gary Cooper and Ann Sheridan.

Q. You don't even name the producer in these ads? A. Well, these were both Eagle Lion pictures.

Q. I mean, there is no name like Leo McCarey in these? A. No, I don't know who actually produced it.

Q. Leo McCarey is the man who made Going My Way and Bells of St. Mary; is he not? A. That is right.

Q. In connection with Eagle Lion pictures, considering their whole 196 pictures, or 195, whichever the right figure is, did they at any time have a program of sufficient quality, taking the whole group, that could be used generally throughout the RKO circuit for a profit?

695 A. You mean all the pictures?

Q. All of them. A. Oh, no.

Q. Now, it has been shown that you did show some pictures on the top-half in your theatres. A. You mean Eagle Lion Pictures?

Q. Yes. A. Yes.

Q. In your judgment did you show every picture that was offered to you by Eagle Lion on the top-half that should have been played on the top-half? A. In our opinion, yes.

Q. And if you played them on the bottom-half, in your opinion they should have played on the bottom-half? A. That was our considered judgment at the time the picture was discussed.

Q. Did you have any conversations at any time with any of the sales force of Eagle Lion, did any of them ever come to you personally, in connection with licensing Eagle Lion pictures other than those you did license? A. No.

The Court: Did they ever come to you and say they weren't getting a fair deal on your circuit?

The Witness: Your Honor, instead of saying,

696 rather, they came to me, I got a call, telephone call, I think just prior to the time that the suit was instituted.

Q. Who called you? A. Mr. Heineman, saying that a suit was going to be instituted because they weren't satisfied as to the number of pictures we had played, or the results, or any way you want to put it, with RKO.

Q. Outside of that call, just before the suit was filed, were you ever told by any official, sales or otherwise, of Eagle Lion that they weren't satisfied with the representation that they were getting over the RKO metropolitan circuit? A. I don't recall any.

Q. No conversations with Mr. MacMillen on that subject? A. Not about the—I don't recall any conversations with Mr. MacMillen during this period.

Q. Did Al Schwalberg ever say anything to you when he was the head man in distribution? A. Well, that is a general statement as to that, you say, did he——

Q. I mean on that subject. A. No, never came to me on that subject.

697 Q. Do you recall an instance where you played an English-made picture called Bedelia over the whole circuit at the request of Mr. Schwalberg? A. I know we played the picture.

Q. You don't recall—— A. But I don't recall the incident.

Q. Did you at any time, as head of the RKO Theatres, have any conversations with Mr. Pickett, of the Loew's circuit or Mr. Vogel of the Loew's circuit, or any other official of the Loew's circuit, in regard to whether you would play or they would play or would not play any Eagle Lion pictures either in your circuit or any other circuit? A. No, sir.

Q. Did you have any agreement of any kind with Loew's? A. No, none whatsoever.

Q. Did you have any agreement with any of the eight distributors that you would not play Eagle Lion pictures or any of them or one of them in your theatres? A. Definitely not.

Q. Did you have an agreements with any film company—— A. No.

Q. (Continuing) ——during '46-'50 under which
698 that film company was obligated to give you any

pictures other than the pictures you actually had under contract? A. No, we had no agreement.

Q. That applies to Paramount, Warner's, Loew's and all other distributors who are in this lawsuit? A. We had no agreements—we have no agreements with any of the distributors.

Q. Other than those signed contracts on which you played their pictures? A. That is right.

Q. Any one of them, any date, could go and sell to your competitors anywhere on any future picture as far as your agreements were concerned? A. That is right.

Mr. Raftery: You may inquire.

The Court: Before cross-examination I have one question in my mind.

You mentioned some other theatres, I think, in Brooklyn and some in the Bronx that played date and day with you that weren't your theatres?

The Witness: Yes.

The Court: Where were they booked? Were they booked through your organization? Were they booked separately?

699 The Witness: Yes.

The Court: Did you know they were going to play day and date with you?

The Witness: Yes, we did. They made their own deals.

The Court: Made their own deals?

The Witness: Yes, sir.

The Court: We will take a recess of five minutes before the cross-examination.

(Short recess.)

Cross-Examination By Mr. Wright:

Q. Mr. Schwartz, you said that you became vice-president and general manager of the RKO Theatres in 1946. Do you remember the date, or the month, or the time in 1946? A. Early in the year.

Q. And what was your position before that? A. I was zone—what was then called a zone manager.

Q. What zone was that? A. It was for the area outside of New York City.

Q. And did you have an contact with the New York theatres? A. Oh, yes—well, contact with? I don't
700 know what you mean by contact.

Q. What was the zone you managed? A. I was directly in charge of all the theatres outside of New York City.

Q. Those were where? What kind of theatres were they? A. RKO theatres.

Q. They were first-run theatres? A. Some first-runners and some——

Q. Will you tell me where they were located. A. Yes, we had theatres in Boston, Lowell, Providence, Washington, Rochester, Syracuse, Cincinnati, Cleveland, Dayton, Columbus, Chicago, Grand Rapids, Kansas City, Detroit, St. Paul, Minneapolis, Sioux City, Cedar Rapids, Marshalltown, Omaha, Davenport, Denver, Los Angeles, San Francisco, Waterloo, Iowa.

I think that is about it.

Q. You were the zone manager in charge of those theatres you have just named, theatres in these cities? A. Yes.

Q. RKO theatres. And who at that time was directly in charge of the theatres in metropolitan New York?

A. I would like to make a correction there. You
701 asked me just what I did prior to the time I became vice-president. I think there was a period of time, the length of which I am not certain, I think it might have been for a best part of two years, which the company was managed by a committee of three, and I was one of the committee of three, and prior to that time I was in the area I have just described.

Q. I see. That period when the committee of three managed the company would be roughly the years 1945, A. Something like that.

Q. Who were the other members of that committee? A.

There was a Mr. Brennan, Mr. James Brennan, Mr. Harold Mirisch.

Q. What was Mr. Brennan's position? A. He was one of the three.

Q. No, I mean, was he an officer of the company? A. No.

Q. Have any title? A. No. Neither he, nor Mr. Mirisch, or I at that time were officers.

Q. You had no titles other than managers? A. We were three general managers.

Q. And then when you became general manager
702 and vice-president in 1946, then you had charge of all the RKO theatres, is that right? A. Yes.

Q. In New York and out. And who was then the zone manager for New York? A. We didn't have at that time—at that time we set up district or division managers in New York.

Q. Who was that? A. Who were they?

Q. Who was under you in charge of the New York theatres? A. Mr. Brennan, Mr. Edelstein——

Q. Just give me the titles. A. Division managers.

Q. All in New York? A. Yes.

Q. Metropolitan New York? A. Yes.

Q. Consisted of several divisions. What were the divisions? A. Well, we had someone looking after the Bronx and Westchester, we had someone looking after Manhattan, lower part of the Bronx, and we had someone looking after Brooklyn and Queens.

703 Q. There was one man for each of those jobs? A. Yes.

Q. And they were whom? A. I am not certain, but it might have been Mr. Edelstein, Mr. Wexo, Mr. Emde. Mr. Brennan passed away almost immediately following the time of my taking over the vice-presidency. I am just a little confused, whether he was—I think it was a month from the time of the vice-presidency.

Q. Who handled the film buying? A. At that time the

film buying was handled by Mr. Mirisch, Mr. Pollon, Mr. Sherman.

Q. Did they have any titles? A. Do you mean corporate titles?

Q. Title of any kind. A. I suppose they were called film buyers.

Q. And did they all participate in buying films for the RKO theatres in metropolitan New York? A. Yes.

Q. Then who was, if anyone, over you when you became vice-president and general manager? A. There was a president of the company, Mr. Kingsberg.

704 Q. And that was Mr. Malcolm Kingsberg? A. Mr. Malcolm Kingsberg.

Q. Then he remained president throughout this period you were vice-president, is that correct? A. That is correct.

Q. He left when you became president? A. No, he left before I became president.

Q. How much of a gap was there? A. I think he left in May, 1950.

Q. For the rest of 1950 who was president? A. I don't think there was a president during that period.

Q. Was there anyone over you at that time? A. At that time——

Q. That you were responsible to? A. At that time we were still an integrated company.

Q. No, I mean in the theatre end. A. Oh, no.

Q. The president of the integrated company was who at that time? A. Mr. Depinet.

Q. That was the next man above you? A. Yes.

Q. That was the next man above you. He was in
705 charge of both exhibition and distribution? A. That is right.

Q. Drawing your attention to this list of theatres that you operated and the runs that you operated them on, I wonder if you—one of them was, I think, the Beacon Theatre in Manhattan, that you described as a first neigh-

borhood run theatre operated by Brandt. Do you know when that became a first neighborhood run theatre? A. No, I said that that was a neighborhood—I said that at some part of the period we are talking about this became a first neighborhood run.

Q. Yes, but that is what I am trying to find out. A. I don't know.

Q. Is the part of the period when you say it was first neighborhood run. A. I don't know the exact date. I think it might be 1948.

Q. Sometime in 1948? A. I think so. I am not certain.

Q. You cannot fix it any better than that? A. No.

Q. Before that it had played in second neighborhood run, I suppose, right? A. It had a—to the best of
706 my recollection—it had a rather mixed policy of playing some what was termed art pictures and subsequent-run pictures.

Q. Neither that nor any of these other neighborhood theatres that you have referred to played ahead of your, or had availability ahead of your RKO first neighborhood run theatres at any time, did they? A. None of the theatres that I mentioned played ahead of RKO theatres, but I would like to—I now recall another theatre or theatres that played with us, and on some occasions played ahead of us.

Q. What are those? A. Either New Amsterdam Theatre on 42nd Street or the Lyric Theatre.

Q. You say they sometimes played the program with you, with your first neighborhood run theatres? A. Yes.

Q. What were those occasions, if you know? A. Your question was did they play with us?

Q. Yes. A. Yes, they would play with us.

Q. I understood you to say that they didn't play with you regularly. A. No. I said on some occasions they would play ahead of us.

707 Q. On some occasions they played ahead? A. Yes.

Q. What were the occasions on which they played ahead? A. I don't recall.

Q. Do you know the name of the picture? A. No, sir.

Q. Or program or anything? A. Not offhand.

Q. Can't give us those. Do you know what the occasion for their playing ahead would be? A. No.

Q. You also mentioned the Luxor Theatre in the Bronx. Will you tell me when that, as playing with your first neighborhood run theatres—can you tell me when that first became a first neighborhood run theatre? A. I think in 1948.

Q. Prior to that time, throughout the period you are familiar with, it had been second-run or further back? A. It played subsequent to us.

Q. You also mentioned the Marine Theatre, I think, of the Century Circuit. Do you know when that
708 became a first neighborhood run theatre? A. I think in 1948.

Q. You cannot fix the time of that otherwise? And before that it had been a second neighborhood run? A. Well, in that case I am not just aware of how it did play.

Q. Well, on your own theatres can you tell me what, if any, changes there were in the playing positions during the period from 1945 to 1946? A. From 1945 to when?

Q. This period you have been talking about. Can you tell me what, if any, changes there were in the playing positions of your own theatres? A. I don't understand what you mean by playing positions.

Q. I was talking about runs. I think you testified to something about the Academy being operated by Skouras during this 1946-1950 period. A. Yes.

Q. I call your attention to the fact that the interrogatory answer filed by the RKO Theatres as to the changes, if any, of your interests in that theatre during the period

says this: Prior to October 1, 1946, acquired a 34.8
709 interest in the annual combined net receipts of this theatre and the Jefferson Theatre up to $150,000 and a 50 per cent interest in the excess. After 6/30/47 ceased to negotiate for or have any interest in this theatre.

Does that answer sound correct? A. The question you asked me, Mr. Wright, was did we operate. I said that the Skouras Company operated the Academy of Music.

Q. I am asking you now whether the statement I just read to you that appears in the interrogatory answers filed by the RKO Theatres is a correct one? A. At one time we had an interest in that theatre.

Q. This 34.8 per cent interest, that was acquired when, do you recall? A. I don't recall.

Q. That was prior to 1945, was it not? A. If that is what the record states. I wasn't——

Q. Do you know what the form of that interest was? Who had the rest?

Mr. Gillespie: Mr. Wright, I really cannot hear a word when you drop your voice that way.

Mr. Wright: I will keep it up.

A. Do I know what form the interest was?

710 Q. Yes, this 34.8 per cent interest. A. Well, we had an interest in the theatre and we disposed of that interest in the theatre. Now, if the percentage that is stated is 34.8, I am assuming that is——

Q. Who had the rest of the interest in the theatre? A. Skouras Theatres, I assume.

Q. That was a theatre which then was actually a Skouras Theatre which was operated with your theatres under a pooling agreement? A. We didn't operate the Academy of Music.

Q. Skouras operated it under a pooling arrangement? A. Skouras operated it and, as I said before, we had an interest, which was disposed of according to the date that you say by us. We disposed of that interest.

Q. I said that interest was pursuant to a pooling agreement under which theatres of Skouras and yours were

operated as a unit? A. I answered by saying we had an interest in the theatre.

Mr. Raftery: I didn't get the date that you read,
711 Mr. Wright. You drop your voice. The date that they got out of it.

Mr. Wright: The interrogatory answer says "After June 30, 1947, ceased to negotiate for or have any interest in this theatre."

Q. That was the date on which this agreement, pooling agreement, or whatever it was, under which you had this interest, expired? A. I am not certain of that, but if the answer there says we disposed of our interest in June, 1947, I assume that is correct.

Q. I am trying to get your own best recollection as to what happened on that date. A. I don't recall, sir.

Q. You don't recall how the interest was disposed of or what caused it to terminate. Another theatre that I think you were referring to was the Riverside Theatre, which I believe you said was independently operated throughout the period. I want to call your attention to the interrogatory answers filed by RKO as to that theatre, which states:

"Prior to 10/1/46 acquired a 65 per cent interest in the annual combined net receipts of this theatre and the 81st Street Theatre up to $270,000 and a 50 per cent interest in the excess. After June
711a 30, 1947, ceased to negotiate for or to have any interest in this theatre."

Is that a correct statement of what happened? A. I assume it is correct, Mr. Wright. You are reading from an interrogatory.

712 Q. And that 35 percent interest that you did not own was held by whom? A. Does it say RKO had a 65 percent interest?

Q. That is what it says here, yes: ". . . in the annual combined net receipts of this theatre and the 81st Street

Theatre up to $270,000 and a 50 percent interest in the excess." A. Mr. Wright, I am not aware of the details. We did have an interest and we disposed of that interest.

Q. And you cannot tell me who had the other interest? A. I assume Skouras.

Q. And what happened was on June 30, 1947, the pooling agreement you had with Skouras was terminated? A. We disposed of our interest.

Q. Don't you know that is how you disposed of these interests because the pooling agreement with Skouras was terminated on that date? A. Well, you are using the word "pooling." We had an interest in the theatre. We disposed of that interest on a certain date.

Q. You know what a pooling agreement is, don't you, Mr. Schwartz? A. It depends. Yes, I understand what "pool" means, yes.

713 Q. And you know you had a pooling agreement with the Skouras Theatres?

The Court: What is a pooling agreement?

Q. Can you tell the Judge what a pooling agreement is? A. The inference seems to me here that two people had an interest in the theatre. We had an interest in the theatre that Mr. Wright mentions and Skouras had an interest, and we disposed of our interest and the term has been referred to as "pool."

Q. There was another one of these called the Nemo on which your interrogatory answer says: "Prior to 10/1/46 acquired a 50 percent interest in the annual net receipts of this theatre in excess of $56,000. After 6/30/47 ceased to negotiate for, or to have any interest in this theatre."

That was also a theatre in the pool with Skouras, was it? A. This was a theatre in which we had an interest, and we disposed of our interest.

Q. Who was the other party? A. Skouras.

Q. And is that also true of the Republic in Brook-

lyn where your interrogatory answer says that:
714 "Prior to 10/1/46 acquired a 50 percent interest in the profits. After 11/7/49 ceased to negotiate for or to have any interest in this theatre."

Or was someone else involved in that one? A. That was Frisch & Rinzler, I think.

Q. Frisch & Rinzler had the other 50 percent interest there? A. I think so.

Q. And that agreement under which they had the interest terminated on the date shown here? A. I don't know the exact date.

Q. And while these agreements with Frisch & Rinzler and Skouras were in effect, the pictures for both theatres were bought and booked by the RKO circuit? A. That is the one correction. I am glad that you asked me.

We bought pictures until such time as we could stop buying for the theatres in which we had a partial interest, and just as soon as we could arrange the mechanics in letting the theatres in which we had an interest handle their own buying and dispose of our interest, we stopped the buying. It was a short time after the——

Q. Will you explain the difference between
715 buying and booking for theatres? A. Well, when you buy a picture, you buy it—you negotiate for a license to show the picture. The booking of a picture is to set the picture in on a certain date or play it on a certain date in accordance with the terms under which you bought it or licensed it.

Q. The booking in your organization, the setting of the dates, the determining of the play dates, is that done by the same people who do the buying? A. That's right.

Q. I understood from the witness who was here before that you did not have a record of the first-run play dates of the pictures that came off Broadway. A. We might have some knowledge of it. It is not an important thing for us to keep. It is a current proposition.

Q. Don't your bookers have to have a record of those first-run play dates to know when pictures become available for subsequent-run bookings? A. Not necessarily, because the person who sells or negotiates for the license of the showing of the picture in the neighborhood theatres would indicate to you when the picture was
716 available. That has a great importance on when we would or whether we would negotiate for a picture.

Q. In general, you do not negotiate for the picture until after—that is, for a subsequent-run deal until after it has completed its first run on Broadway? A. There is no general policy about that.

Q. Well, what is the practice? What happens ordinarily? I am talking about this period 1946 to 1950. A. We can license a picture after we see it or negotiate for the licensing of the picture, or we can license a picture while it is showing on Broadway or we can negotiate for the license of a picture after it has completed its run on Broadway.

Q. If you bought it before it had shown first-run Broadway, then in order for your booker to know when it would be available for the circuit and first neighborhood run, he would have to know the Broadway first-run play dates, wouldn't he? A. He would have to know when the picture terminated on Broadway. He wouldn't have to know when it started and it would not be necessary to keep a record of when it played. He would only
717 have to know when the picture was available for him to play, and in our business it does not take very much time when a picture is available for somebody to insist on a play date, so we know the picture is available.

Q. Do you have any knowledge with respect to that picture Destination Moon as to when you bought that for the circuit? A. No.

Q. You don't have any recollection about it at all? A. I know we played the picture.

Q. And you don't have any idea when you negotiated the contract? A. No.

Q. Or with whom? A. No.

Q. Was it negotiated by you at all? A. No. I said that. I didn't actually negotiate the contract.

Q. During this period, who else was handling the licensing negotiations for the metropolitan circuit here? A. Of Destination Moon?

Q. No, for the circuit generally. Who in your
718 organization? A. I mentioned Mr. Mirisch's name, I mentioned Mr. Pollon, Mr. Sherman.

Q. They were the buyers; is that right? A. Yes.

Q. So that in the ordinary case the negotiations were with them rather than with you; is that right? A. In the normal case, yes.

Q. I think you said you had only one conversation yourself with anyone from Eagle Lion about films, Eagle Lion films. A. I said I didn't recall any other.

Q. You could only recall one that you had; is that right? A. That's right.

Q. And you don't have any knowledge as to how many there might have been with your film buyers? A. Well, the question is a little bit different now. You asked how many conversations or if I had any conversations with anyone from Eagle Lion or did I have any conversations with anyone from Eagle Lion with respect to a particular picture.

In the normal conduct of our business I have conversations with people in our industry at various
719 social functions and ordinary functions. Conversations and negotiations or conversations with respect to particular pictures is a little bit different.

Q. Now, you were here, were you, when you heard Mr. MacMillen testify to the conversation that he had with Mr. Kingsberg? A. Yes, I heard Mr. MacMillen testify.

Q. You were not present at that conversation? A. I don't think so.

Q. Was that conversation discussed with you at all? A. I don't recall any definite discussion of Mr. MacMillen's conversation. I don't know the date of Mr. MacMillen's conversation any more than I know the date of Mr. Heineman's call, but I know that when I received Mr. Heineman's call I mentioned Mr. Heineman's call to Mr. Kingsberg. I don't recall any conversation with Mr. Kingsberg.

Q. You don't recall any mention by Mr. Kingsberg of his conversation with Mr. MacMillen, is that it? A. Nothing—no, I can't recall exactly, no.

Q. As to your selection of pictures, do you know what is generally referred to or was in the period 1944-
720 1945, referred to as the RKO split? A. Do I know what was referred to?

Q. Do you remember that term? A. Yes, I have heard the term.

Q. What does it mean? A. Well, it was a term which came up to indicate—I would assume it was started by the theatres which played after Loew or RKO, and the theatres which played the pictures which the RKO theatres or first neighborhood theatres had played prior to them was called by them an RKO split.

The theatres which had played the pictures which had played first neighborhood run at Loew theatres were termed by subsequent-run exhibitors a Loew's split.

Q. The pictures which played the RKO split were the pictures of what distributors? A. Well, the pictures which played RKO theatres were the pictures of all distributors.

Q. All the distributors? The RKO split consisted of a split which contained all of the distributors; is that right? A. The RKO split—I don't know what you mean by RKO split now. You asked me which pictures I played in RKO theatres?

Q. I asked you what the term "RKO split"
721 meant. A. I told you the theatres which played subsequent to RKO identified the pictures which they played as the RKO or the Loew's split or an RKO picture or a Loew picture.

Q. Just tell us what the Loew's split meant. A. The Loew's split was referred to buy subsequent-run exhibitors as the pictures which played the Loew theatres, often referred to as Loew piettures, incorrectly, in first neighborhood run and which a subsequent-run theatre would play in its theatre.

Q. Could you tell us the distributors who were on the Loew's split? A. We played——

Q. And also the distributors who were on the RKO split. A. We played the pictures of RKO, we played the pictures of Warner, we played the pictures of Fox, we played some Columbia pictures, we played some United Artists pictures, we played some Eagle Lion pictures, we played some Republic pictures, we played some Monogram pictures and we played pictures of many sundry independent distributors.

The Court: Did you play any Paramount pictures?

722 The Witness: Not in most of our theatres, no, sir.

The Court: You played some of them. Did you play any Loew pictures?

The Witness: No, sir.

The Court: Never?

The Witness: No, sir.

By Mr. Wright:

Q. In addition to Loew and Paramount, weren't the pictures of Columbia and United Artists generally played on the Loew's split?

The Court: I think you have two things there. You are talking about "split" in one sense and he is defining

"split" in another sense. You had better ask him what you want to know without putting that phrase in it. Just ask him whether they were played.

Q. The pictures that played on the Loew split, if I understood your testimony, Mr. Kingsberg—— A. My name is Schwartz.

Q. ——I mean Mr. Schwartz, I am sorry—were generally the pictures which played the Loew circuit; is that right?

723 The Court: The witness has identified the Loew's split as meaning the pictures played at Loew's. Maybe you think it means something else, but let us get the fact.

Mr. Wright: He has also identified it, as I understand it, the Paramount and Loew's pictures, as generally playing on the Loew's split.

Q. Is that correct? A. The Paramount and what?

Q. Loew. A. Loew pictures played Loew theatres——

Q. And Paramount. A. ——and Paramount—Loew picures played Loew Theatres entirely; Paramount pictures played Loew theatres. We played some Paramount pictures in a few of our theatres.

Q. Did you play any long half top features? A. Yes, a few of our theatres.

Q. When did you play those? A. The records will show that.

Q. That is what I want to see is a record. A. Well, I haven't got any.

Q. Can you give me the name of a picture? A. Of a Paramount picture that we played?

Q. A Paramount picture during the period 1946-
724 1950 that played your circuit—— A. Mr. Wright, I said that a Paramount picture played some of our theatres; not substantially all, no, a few of our theatres. I said that.

Q. A few of your theatres played an occasional Para-

mount picture, is that what you said? A. That is all I said.

Q. My question is directed to the pictures of the distributors that played across your circuit. A. You mean in the majority of our theatres?

Q. Yes. A. We didn't play Paramount pictures in the majority of our theatres.

Q. And that is also true, is it not, of Columbia and United Artists as well as Paramount? A. No, it is not quite as much true of Columbia and United Artists as it is of Paramount, because we played quite a few Columbia pictures, a number of them. I don't know the number. And some United Artists pictures.

Q. But most of the top pictures played in the Loew houses, didn't they? A. I think they did. I think that is correct.

Q. And how about Universal? Do you know how
725 the Universal pictures were handled? A. We played some Universal pictures, yes.

Q. And Loew played some? A. And Loew played some.

Q. Do you know how they were divided? A. No. They were sold to us, and I assume they were sold to them.

Q. You haven't any idea how it was determined which Universal picture you would play and which one the Loew circuit would play? A. Universal might determine that sometimes.

Q. Did you ever have any discussion with the Universal people? A. No.

Q. You did not have anything to do—— A. The question is quite broad. You say did I have any discussion with Universal?

Q. Yes, as to how the Universal pictures were to be divided between the Loew and the RKO circuits. A. No.

Q. Do you know, Mr. Schwartz, the clearance that the

RKO houses had over the independent houses in subsequent runs? A. We had seven days' clearance.

726 Q. And that was general for all the companies, is that right? A. I think it was general for all companies, yes.

Q. In exploiting a picture in your circuit, did it make any difference how soon after the first run a picture got into your circuit? A. Not always. It was not vital. Sometimes it would help and sometimes it wouldn't mean anything.

Q. In general, about how long after a picture finished its Broadway run would you play the picture? A. Which pictures?

Q. I am talking about top features. A. There is such a variance. We are talking about four years of pictures. They played three weeks after, six weeks after, eight weeks after, twelve weeks after.

Q. What would be the normal interval? A. That would depend upon the availabiliy of playing. Each picture was different.

Q. You cannot approximate within a month or a couple of weeks what the normal time would be that would elapse between the time a top picture finished its first run and got into your circuit?

727 A. The determining factor there was what playing time we had, what other pictures were available.

As I said before, the number or the amount of time varied almost with each picture.

Q. What was the extent of the variation, would you say? A. It might go from two weeks to two or three months.

Q. Isn't it a fact that most of your top pictures would play in your circuit within a month after the end of the first run Broadway? A. I don't know the average of this particular period. I said from two weeks on. We had some cases that were two or three months later.

Q. Isn't it true if you wanted to get the benefit in your subsequent-run theatres from whatever advertising and

publicity attended the first-run exhibition, you would have to play the picture in your circuit fairly soon after it finished the first run? A. That would depend upon the nature of the picure itself. There are some pictures, as I said before, to which you could attribute some benefit for playing it soon and some to which it made no
728 difference and to some it might even be an advantage to delay it.

Q. I understand there might be some pictures which would not have a first run that would give them any value at all, but I am asking you now—— A. I am talking about pictures which even had first run.

Q. I am talking about pictures which had a successful first run in what your counsel here has described as a first-class, first-run theatre. A. Well, it was described as pictures which played a first-class, first-run theatre. The most recent one I can cite you—I am just trying to think to answer your question—is a picture . 'ch we played, Sincerely Yours, which played the Paramount Theatre here, which was described as a first-class, first-run theatre. We found it advantageous to wait a long time to play that so that people might forget the picture a little bit.

Q. I assume that if it is the kind of an attraction that you don't think you are going to make any money with, you defer playing it as long as you can, but I am talking about a picture which has a successful first run in a first-class theatre.

729 Now, is it not a fact—— A. Yes, we try to book our pictures in the slot of when they are available, taking into consideration other pictures for which we have contracted for license agreements.

Now there are pictures that come off Br dway sometimes in clusters. When engagements of pictures finish about the same time and we have already contracted for those pictures, we only can play one picture at a time and

one picture will be delayed. We play the picture at the time we think will produce the best revenue.

Q. The pictures just have to wait their turn, and you decide the order; is that right? A. It is not quite as simple as that. It is not a question of waiting their order. We buy the picture for playing after first run. When the picture becomes available, we set the picture in at a time we think we can do the best job, not only for ourselves but for the distributor from whom we bought the picture.

Q. And you say you play one picture a week? A. No, I say we play one show at a time.

Q. One show at a time? A. Yes.

730 Q. There is just one top picture that you put in the circuit? A. I mean we play one show at a time.

Q. And that show is—— A. To cite you an example, Mr. Wright, a picture might come off a first run Broadway on November 20th and might be a picture from which we expect great results and from which the distributor expects great results, and we push it back to Christmas or some holiday that is in the offing, or July 4th or something like that.

Q. Let us get back to this one show. By "one show" you mean one double bill; is that right? A. Well, we play most of our pictures on a double feature program, yes, that's right.

Q. And that was true during 1946-1950? A. Most of our shows were double-feature programs.

Q. Can you remember any single bills during that period in your circuit, across the circuit? A. Well, you are pinpointing me to a period. We played a number of single feature pictures, yes. I mean single feature shows. I am not certain on my dates now. I can tell you pictures, if you want.

731 Q. Can you give me the names of some? A. We played Mildred Pierce, we played Sergeant York.

I think the records will show that we played some. They were exceptional and they were fine, great pictures.

Q. And those are the only exceptions you can think of offhand during the four-year period? A. I can't think of any more, no.

Q. You said something, if I understood you correctly, about operating these theatres so as to appeal to the particular people in the neighborhood where they were located. A. Yes, to the segment of the population, that's right.

Q. But that did not apply as far as the bill itself was concerned, did it? A. Didn't apply so far as the what?

Q. The selection of the bill that you are talking about, the show. A. We did the best job we could with what was available.

Q. If I understood you correctly, you invariably saw that the people in Westchester, White Plains or New Rochelle would have the same pictures to look at at the same time as they were showing in your theatres
732 in Manhattan and The Bronx; is that right? A. That is the best of what was available and that is what we had to give the customers.

Q. That is the way you did it? A. Yes. When I referred to the segments of population, I meant in a broader, much broader sense. I took New York as a unit because I think most of the people in the City of New York—we think most of the people are average, have certain dislikes, likes, desires and lack of desires, and we feel from our experience, that what the people in New York like may not be liked in Davenport, Iowa, and vice versa.

Q. So far as you are concerned, the people of New York and lower Westchester County are just one unit insofar as motion picture tastes—— A. I don't think the people in Westchester are any different than the people in New York City.

Q. I would like to finish the question. A. I am sorry.

Q. I say it is your opinion that so far as taste for motion pictures are concerned, all of the people in the

four boroughs and in these towns in Westchester are properly treated as a single unit? A. I didn't say
733 that all of the people. I didn't say that. I said we have to try to appeal to as many people as we think we can attract.

It is impossible to show a picture, any picture, in any theatre and have a hundred people out of a hundred walk out and say that they liked that picture, just as you might find a person walk out at the end of a picture like Marty, which to me is one of the fine pictures of the year, to say it is delightful, "I enjoyed it," and you could just as well hear the fellow behind him say, "What is all the fuss about? I didn't care for it at all."

That is likes and dislikes, yet you book a picture like Marty because more people you think like it than don't like it. I couldn't very well book a picture for each theatre. There aren't that many pictures.

Q. Under your program of operation, you would consume roughly what—two hundred a year in your first neighborhood runs? A. I think that would approximate the figure.

Q. In selecting these pictures and deciding who is going to be in and who is not, you say you screen the pictures, do you, you look at them, and that is one means
734 you have? A. Yes.

Q. And you also find out what they have done in other parts of the country, don't you? A. That is one of the factors, and you——

Q. You also get regular reports on every picture from all the RKO theatres in these other cities you have mentioned? A. From all of the RKO theatres, yes.

Q. And what they do in those areas is what you take into account in deciding what you are going to do with the picture; is that right? A. One of the picture's factors, yes.

Mr. Wright: I wonder if we could have a short recess?

The Court: A five-minute recess. Do you think you could finish with this witness?

Mr. Wright: I was hoping we could, yes.

(A short recess.)

By Mr. Wright:

Q. Mr. Schwartz, of those 200 pictures a year you said you use in the circuit, there were really only 50 of those that could earn top film rental a year under your method of programming? A. Only 52 could play five days.

734a Q. At top rental? A. All you have is 52 weeks.

Q. Those were pictures which would get the most film rental? A. If they performed.

Mr. Raftery: Just two or three questions.

735 Redirect examination by Mr. Raftery:

Q. Mr. Schwartz, Mr. Wright has directed a number of questions, I imagine, to "Destination Moon," playing some date in the summer at the Mayfair Theatre and playing sixty odd thousand first-run film rental and then you didn't play it or buy it even until, I believe, in January, 1951.

In the meantime, had you, after the Mayfair engagement, did you buy the picture for first run Boston? A. Yes, we did.

Q. And you gave him what, a 3-week booking? A. I don't recall. I think that we bought, I mean, on the specific engagement now, we bought the picture, I think the intention was to play it three weeks. It may have been for 3-week booking. We played it two weeks only.

Q. Was the engagement successful? A. No, we lost money on it.

Q. After that did you try to avoid buying that picture for—— A. Well, it was because of the experience we had in Boston. The picture opened on Broadway,

736 played the Mayfair Theatre. I don't remember just what month it opened or how it played, but I remember it played with a fanfare and an exploitation campaign, and I think the figures will show that

it attracted a fairly good gross the first week, but the gross receipts from the first week didn't stand up in proportion.

In other words, the picture did not sustain its strength, and when the bargain after that—we had bought the picture for Boston. I am not certain whether we bought it prior to the Broadway engagement or with the opening of the engagement on Broadway, but our experience in Boston was very bad. I think we lost something like three or four thousand dollars on that engagement.

We curtailed the run from, I think, a planned three weeks, to a two-week engagement.

And that immediately set up the obstacles for buying the picture for license in New York, the back and forth negotiation of the distributor on one side, trying to sell his wares, and the buyer on the other side, trying to buy as cheap or as inexpensively as possible, each putting forth their reason why to make a certain deal, and it was probably because of our lack of enthusiasm with the picture, due first to its decline on Broadway and to
737 our own experience at Boston, that the time lapsed to actually negotiate. I don't know when we negotiated the license agreement but we did play it in January.

Q. Mr. Wright has asked you a number of questions about only 50 pictures, 52 pictures, get long halves over the circuit. Did you cause to be made up for me a chart showing the number of feature pictures that you played in whole or in part in your circuit for the years '46 through '50? A. Do you mean—you don't mean did we play the pictures in whole or in part? You mean in whole or in part of the business?

Q. That is what I want, how many.

The Court: Did you make up such a chart?

The Witness: Oh, yes, that is the answer to the question, yes, I had it made up.

Q. During this period, according to Mr. Gross, you

played pictures from 33 distributors. This lists 30 and a miscellaneous. A. That is right.

Q. How many pictures in total did you play in some of your theatres during that period? A. The record shows 1,005.

738 Q. For the first year? A. 526, 469, 585 and 525.

Q. So in order to supply your metropolitan circuit with enough pictures during this period you bought this number from these 30-odd distributors? A. That is right.

Q. And you had listed it by companies with the exception of miscellaneous? A. That is right.

Mr. Raftery: I offer it in evidence.

The Court: Any objection?

Mr. Wright: Let it go in.

The Court: Received in evidence.

(Marked Defendant RKO Exhibit D.)

Mr. Raftery: Only one more question.

Q. You played Jackie Robinson, according to an exhibit, over the circuit Labor Day 1950? A. That is right.

Q. That picture came off Broadway sometime—— A. That is right.

Q. ——in the early summer? A. That is right.

Q. Why did you hold that until Labor Day? A. As I explained before, the play-off of pictures into the

739 neighborhood varies from one picture to another. It might be for the reason that we felt that a picture could produce more revenue by playing it in a certain period.

For example, the Jackie Robinson story, you were referring to it, that was the year that Robinson made his debut, I think, or at least became very popular with Brooklyn, and we played it right in the height, or the

heat, rather, of the pennant race over a holiday and did a very good gross with it.

740 We have done exactly the same with a Disney picture which was available to be played in May, where we would hold it back until July because the kids were out of school. That is when to play a Disney picture, if you want to do business with a Disney picture, or if you want to do business with Robinson.

Q. So there is no set rule about playing a picture immediate after Broadway? A. No. It might serve a purpose sometimes to play it immediately after Broadway. If the Robinson Story came off in the end of August, it would have been——

Mr. Raftery: All right.

Mr. Wright: You are excused.

Mr. Raftery: That is all.

By the Court:

Q. Let me ask a question. When Eagle Lion salesmen came around to sell a picture, you would have a picture exhibited in your exhibition room, would you? A. We would have them screened, yes.

Q. You would have it screened. A. Yes.

Q. Did you ever hear they had it screened over
741 at Loew's? I mean, would they come——A. Same picture?

Q. Same picture. A. I wouldn't know that for a fact, your Honor. I know that the Loew people have a projection——

Q. You wouldn't know? A. That specific picture?

Q. Yes. A. I wouldn't know that. We went to—I think it has been testified to here that we screened a hundred and some odd pictures of Eagle Lion, and I would assume that some of the pictures which we—which they played, they screened, which we screened.

Q. What I am trying to find out is this. If some picture came to be screened by you and you felt this was a

good picture, then would you make an offer for the picture right then and there? A. That might take a couple of days. You might get a call——

Q. In the course of those discussions did you hear—was it called to your attention that Loew's had offered them a price for that same picture? A. The nearest I can recall to such an incident, your Honor, took place with the picture Tulsa.

742 Q. Yes? A. We didn't feel that Tulsa was a top picture per se in New York for the reasons I explained before. However, we needed pictures and we tried to buy Tulsa, but we tried to get Tulsa on the terms and conditions which were not agreeable to the Eagle Lion people, but we didn't play Tulsa.

Q. Did they say anything that Loew's would buy it or anything like that? A. No, they didn't say. The picture did play the Loew circuit.

Q. Was there any bargaining back and forth between you and Eagle Lion on the basis that if you didn't buy it Loew's would buy it, or did they come in and say, "Well"—— A. "Give me $50 more and I'll sell it to you"?

No, it never got to that point. They would try to sell it to us, and if we would buy it, we had the picture. If we didn't buy it, from the records I assume they went to them, and I don't know whether they went there first or to us first, or how the chronological order of approach was, but, answering your question whether the same picture was screened by both people, it is a common practice in our industry for all of the people who buy pictures, whether they buy for a theatre such as the Astor or

743 they buy it for twenty or thirty theatres, to spend considerable time, and it wasn't mentioned here, but the screenings, which I suppose aren't recorded, were screenings which took place at night because there were a number of times I couldn't attend during the day for one reason or another, and we would come down at night and watch a couple of pictures, and sometimes it was

very enjoyable and sometimes not to spend an evening that way, but we examined as many pictures as we could do consistent with carrying on the rest of our business, because the picture itself, what you put in your theatre, that was the guts of your business.

Q. I understand. What I am trying to find out, was there any understanding that if the picture was shown to you for screening they were going to show it to Loew. A. Oh, no, sir.

Q. You said that you showed some Paramount pictures. A. In a few theatres.

Q. Plaintiffs' Exhibit 22 indicates you showed a very small amount and Loew's showed a large amount. Were the Paramount pictures screened by you? A. Yes, sir.

744 Q. They would come over to your place and have them screened? A. Yes, sir.

Q. Would you make bids for the Paramount pictures? A. For the situation in which we thought we could use Paramount pictures we did.

Q. How was it then that practically all the Paramount pictures were shown in the Loew's circuit? A. Because at that time we had sufficient pictures of the pictures we were buying to fill our needs. It is just a matter, as I stated before, you have one show to play at a time and if you play the greatest shown on earth, you don't play the road, and if you play the road, you don't play the greatest shown on earth. And it isn't possible for anybody to play all the pictures. And this was a—we were negotiating with people—we had pictures for which we had made contracts and which satisfied our needs, and that is where we bought the pictures. Where, on occasion, we needed a picture, or reached out for a picture, the list of distributors I think indicates that we bought pictures from United Artists, we bought some pic-

745 tures from Columbia, or, if we didn't need a lot we bought just what we did.

Q. You had an inside break on the Fox and Warner pictures, didn't you? You got most of the Fox and Warner pictures and Loew's didn't get any. A. When yau say "inside break"——

Q. How come you got Fox pictures and Warner pictures? A. We were, at least for the Fox, at least Fox, we were dealing with a satisfied customer, Fox. We returned to them revenue commensurate with what they thought the potential of the picture was, and when the next picture came along they turned to us to buy it. If it got to the point I wasn't going to buy Fox pictures, I woud have to look elsewhere to get another picture. It is conceivable, if I didn't play any Fox pictures, I might have played all Paramount pictures or vice versa.

Q. Did you testify in the Paramount antitrust case? A. My lawyer would have to tell me that. I was in quite a few of them.

Q. Nearly everybody in the industry was in it. A. Is the Fanchon & Marco case a Paramount case?

Mr. Wright: I have just a question or two.

746 Recross examination by Mr. Wright:

Q. The Judge mentioned bidding for pictures during this perion 1946-1950. In these situations you operated outside of New York City you found you were—sometimes you had to bid competitively for pictures first run, did you not? A. Yes, sir.

Q. It is also a fact, isn't it, all during this period 1946-1950 you ard Loew never bid competitively against each other for the privilege of buying any pictures, Eagle Lion or anyone else? A. That is not true.

Q. In the—just a minute. A. I'm sorry.

Q. In the Loew and the RKO metropolitan circuits? A. You started to talk about out of town——

Q. I am talking about competitive bidding. A. You started to talk of out of town. You said have we had competitive bidding.

Q. I said, you found you had to bid competitively in some of the towns outside of New York. A. On some occasions we did.

Q. To get a first-run picture? A. That is right.

747 Q. Just listen carefully to my question: It is a fact, isn't it, that during this period in 1946 to October 1950 you and Loew did not put in competitive bids for anybody's picture for your respective New York metropolitan circuits? A. I don't think that is true, either.

Q. Can you just name one picture for me where that happened? A. I think we competitively bid for pictures on 181st Street. I am not sure of the date now.

Q. I want to know. I want the picture and the theatre. A. Coliseum Theatre.

Q. And when did you say you were engaged in this bidding? A. I didn't know.

Q. You cannot give me the date? A. No.

Q. Do you think it was sometime within the period 1946-1950? A. I am not certain.

Q. You cannot give me the name of the picture? A. No.

Q. Can you give me the name of the distributor?

748 A. Fox.

Q. Fox? A. Yes.

Q. You say you think you bid for some Fox pictures against Loew's Circuit sometime in that period? A. I think we did bid for a Fox, maybe two Fox pictures, yes. I am not certain of the period, Mr. Wright. You keep saying——

Q. The period is important. A. You asked me if I ever as far as——

Q. No, I didn't ask you "ever." I said "during the period." A. Then my answer is I am not certain.

Q. 1946-1950? A. I am not certain of the time.

Q. Those are all written bids. Have you that? You have a written record of that? A. Might have.

Q. Well, the way it is handled, the distributor sends you a written invitation—— A. Yes.

Q. (Continuing) ——and the exhibitors respond with written bids; isn't that the way it is done? A. Not always.

Q. No? A. No. We can ask for the——

749 Q. At least, would you get it——A. Yes.

Q. ——you get a written invitation to bid and you customarily respond with a written bid. This 181st Street, you say that was one theatre that—what was the—— A. 181st Street, I said, Coliseum.

Q. What was the Loew Theatre that was involved? A. In what, the bidding for the picture?

Q. Yes. A. I don't know who bid for the picture, but I had to bid for the picture. It is not disclosed to us who bids.

Q. You don't know whom you were bidding against? A. I don't know who I was bidding against?

Q. Yes. A. I know the result of the bid.

Q. Can you answer the question? A. No, I was never told who was bidding against me.

Q. You don't know whether this bidding you just talked about occurred during 1946-1950? A. No, I am not certain.

By the Court:

Q. When the picture is screened or projected, you may say "that is a good picture, we would like to

750 have that for our circuit." What do they do then? Do they make an offer to, we will say, to Eagle Lion or Paramount or whoever the distributor is? What is the mechanics of what takes place at that time? A. The mechanics—the distributor makes available for screening these pictures.

Q. Yes? A. And he naturally is aware of the date on which you are going to screen the picture, because it has to be done in orderly fashion. And following the screening of the picture, I am almost certain that the distributor or some representative of the distributor calls one of

ny people, whom I have mentioned here, and says, "Now, how about it?" and then they get into a discussion. That can be done over the telephone or it can be done over lunch, or can be done by the distributor coming to the office and seeking out a contract or play date with the contract, and negotiations start.

Q. Those negotiations may go on at the same time with Loew, so far as you know? A. As far as we know, they can go on with anybody.

Q. But who fixes the price, does the distributor say, "We will give it to you at this price"?, or do you
751 say, "We will buy it at a certain price"? A. Your Honor, that is done on a normal course of buying and selling. The distributor usually wants everything and he feels as though the exhibitor wants to give nothing. This is an every-day argument that we are in, this is an every-day discussion we are in, as to the value of the picture, its potantial merits, and that is why you listened, your Honor, to negotiations which have to do with an agreement among or between the distributor and the exhibitor to the effect that a certain percentage is arrived at and then the distributor, to protect himself, says, "But if it does this fantastic business, I want more of the share, or the lion's share."

Pictures are bought with a 25 per cent or 35 per cent minimum, but if you reach a certain figure you might have to give them 50 per cent. Unfortunately, lately it has gotten to the point where we have given 90 per cent above a certain figure to distributors.

This is an every-day problem, buying and selling, arguments about quality, arguments about potential draw—drawing power.

Every body puts their best foot forward as to how the picture did in Yokohama or how it did in
752 Indianapolis, and the other fellow saying, "Well, that is not going to do well in New York, Boston," or something like that. That is every-day trade and buying and selling. This is all this amounts to.

Q. For your first run neighborhood theatres in New York did you ever buy a reissue and put it on first neighborhood run? A. To play in theatres away from my first—yes, we played reissues.

Q. You played reissues? A. Yes.

Q. Was that common or not? A. Your Honor, the playing of a reissue is something which started—it started first because there is a shortage, and what makes a reissue and why is a reissue played, and who determines what reissues shall be shown, that is a whole operation which has to do with selecting pictures sometimes which at their original showing did not bring out from the public great results, possibly because the then-player was then unknown, and maybe in subsequent years this player developed into stardom, such as Grace Kelly today.

753 Today, somebody took a Grace Kelly picture and people hardly remember she was in then, the picture today, because of the publicity attendant to Grace Kelly's marriage and so on there would be box office in playing a Grace Kelly picture.

The same has to do with a young star, a young player, who in the interim period became a star.

This explains, you will play an Alan Ladd picture and mention the name and people say, "I don't remember that."

We try to be truthful about it, telling the people that these are reissues and re-releases, and very often people come into the office and say, "By golly, I saw that picture and I would like to have my money back."

Q. You weren't interested in reissues of Getting Gertie's Garter, or Up In Mabel's Room or Twin Beds. A. That had a drawing appeal; had a different appeal.

The Court: All right, we will adjourn until 10.30 tomorrow morning.

(Adjourned to February 16, 1956, at 10.30 a.m.)

* * * * * * *

754 **Sol A. Schwartz**

resumed.

Mr. Raftery: There is one item on this last exhibit.

(To clerk): Is that number 28?

The Clerk: Yes, sir, that was the last one.

Mr. Raftery: By the way, Mr. Wright asked me yesterday if I would bring down the screening book.

(Mr. Raftery produces book.)

Mr. Raftery: That runs from 1941 and is still running.

The Court: Fine. You wanted Exhibit 28. I have a copy of it here.

Mr. Raftery: That is the one, your Honor.

Redirect Examination By Mr. Raftery:

Q. Mr. Schwartz, did you last night take a copy of Plaintiff's Exhibit 28, which was the last exhibit submitted by Mr. Gross as "Examples of Eagle Lion
755 Pictures Which Did Not Play Loew or RKO Metropolitan New York Circuits, But Which Grossed Nationally More Than Major Distributors' Pictures Which Did Play One of These Circuits"? That is the heading on it.

Mr. Wright: Excuse me just a minute. 28 I think is not that. I want to make sure I am looking at the same one.

The Court: That is 27.

Mr. Raftery: Well, then, 27 is the one.

Q. The first example that Mr. Gross put in this exhibit is Shark Island and Tornado Range and that the national grosses were approximately the same, $58,000 in one and $58,700 in the other and that RKO played Shark Island, a reissue from Fox, and paid $6300 for that reissue.

Now, first of all, when did you play that picture in the RKO theatres? A. We played it in September, 1947.

Q. For how many days? A. Two days.

Q. The 22nd and the 23rd? A. That's right.

756 Q. What did you play with it? A. With Shark Island we played a picture called Swamp Water, another Fox picture.

Q. And what did you pay for Swamp Water? A. $6300.

Q. Now, what did you gross on that two-day engagement of those two pictures? A. About $69,600.

Q. Now, the picture that is compared with it is an Eagle Lion picture called Tornado Range.

When was that picture released? A. In February, 1948.

Q. Now, so as to availability Tornado Range was not even available at the same time as Shark Island? A. No, it was not.

Q. What was Tornado Range? A. Tornado Range was one of a series of low-budget westerns with Eddie Dean.

The Court: With what?

The Witness: With Eddie Dean. It is the name of a player.

A. (Continuing) It was a type picture that we haven't played and we found unprofitable to play.

Q. And you would not have played it under any condition in any of these theatres first neighborhood

757 run? A. No. Even if it were available at the same time, we wouldn't have played the picture. So that if the two things were offered at the same time and a choice had to be made, we wouldn't have chosen that show and we couldn't have chosen it because it wasn't available at that time.

Q. So there is no comparison between the two pictures at all?

The Court: That is a little leading, that question. Let us move on to the next one.

758 Q. Take the next grouping, Fox, This Is My Affair, a reissue. When did you play that? A. We played that in July of '48.

Q. Now, you screened Shed No Tears? A. In June of the same year.

Q. Did you play This Is My Affair with—— A. We played that with a picture called Johnny Apollo.

Q. Was that a top flight picture? A. That was a reissue.

Q. A reissue show? A. That is, the two of them were reissues.

Q. You paid $4,900? A. For each of the pictures.

Q. What percentage did you give Fox, we will say, on the Shark Island-Swamp Water in rental, film rental, to gross? A. Well, it was about 20 per cent—a little under 20.

Q. Under 20 per cent. What did you gross on the Apollo-This Is My Affair? A. $66,500.

Q. And you paid 20 per cent—— A. Or $9,800 for the two pictures.

759 Mr. Wright: What was that? I didn't hear that figure.

The Witness: $9,800 for the two pictures.

Q. From your observation, were those successful engagements for you at your theatres on those two days showing? A. Yes, we did well with both of those shows.

Q. In the next group, I Am a Criminal, that was an RKO picture? A. No, that was a Warner picture.

Q. I mean a Warner picture, but you played it on RKO circuit? A. That is right.

Q. Long-half as a second feature? A. That is right.

Q. When was that played? A. In March '47—in March, 1948.

Q. Star Over Texas, of Eagle Lion, was that another Eddie Dean western? A. It was a western with Eddie Dean, yes.

Q. When was that released? A. In November of '46.

Q. And the Shamrock Hill? A. Released in May '49.

760 Q. Neither of them was available when you played I Became a Criminal? A. No, that is right.

Q. Number 4, a Warner picture, Hatchet Man, a reissue, you played it on the RKO circuit and paid $3,200? A. Yes.

Q. According to the exhibit? A. That is right.

Q. What did you play it with? A. Farewell to Arms.

Q. Is that a top feature? A. Reissue.

Q. Reissue, but it had been a very successful pictures? A. Yes.

Q. You played that what date? A. In November, 1949.

Q. When was Old Fas. ioned Girl available? A. In December of 1948.

Q. Heartaches? A. Was available or screened in June of '47.

Q. Neither of them was available at the same time that you played Hatchet Man with Farewell to
761 Arms? A. That is right.

Q. What did you gross on that show? A. $44,900.

Q. In the next grouping there are four Eagle Lion pictures and one Fox picture called Johnny Apollo, a reissue, which is the same Johnny Apollo that you played—— A. That is right, part of the same—the pictures have been separated, according to the schedule, but it was played on the same show except that they compare the gross on Johnny Apollo with other grosses of Eagle Lion pictures. I don't know how that is counted. I played Johnny Apollo together with This Is My Affair and they put it in two different places.

Q. Yes, put it in on the Johhny Apollo gross and they put it in under This Is My Affair gross? A. That is right.

Q. To shorten this, were any——

Mr. Wright: What gross? I don't see any gross figure. You are talking about film rental figures?

Mr. Raftery: Yes, yes.

Mr. Wright: I am sorry.

762 Mr. Raftery: That is known as national gross in the trade.

Mr. Wright: He has been giving testimony about grosses. I thought those were theatre grosses.

Mr. Raftery: Oh, no, no. We give theatre grosses separately.

Q. You have four Eagle Lion pictures listed here. Were any of them available at the same time that you played Johnny Apollo or This Is My Affair? A. No.

Q. Now, in category 6, on the RKO, there is only one listed and that is I Wake Up Screaming, a reissue, and that played with what other feature? A. Blood and Sand.

Q. That picture was played when? A. In June, 1948.

Q. Were either Heading For Heaven or Spiritualist available at or about that time? A. We screened Spiritualist in June, 1948.

Q. So that was—— A. That is right.

Q. (Continuing) ——or could have been played—— A. That is right.

763 Q. (Continuing) ——if you desired, or could make a deal, I mean. On this reissue that you played of Blood and Sand for two days, what did you gross? A. $79,000.

Q. And you paid what? A. $6,300 for each picture.

Q. In category 6 you played a Fox picture called Thirteen Lead Soldiers? A. In October '49.

Q. For one day, October 12, 1949, is that right? A. That is right.

Q. And you also played a Fox picture How Green Was My Valley, a reissue? A. That is right.

Q. On January 26, 1948? A. That is right.

Q. One day. And you played Code of the West for one day? A. In 1947, April.

Q. In April, 1947, with a Fox picture called Dangerous Million? A. That is right.

Q. These Eagle Lions that are in this schedule, one is Wild West, an Eddie Dean picture released in when? A. December, 1946.

764 Q. That is the same Eddie Dean you said you wouldn't play under any consideration? A. That is right.

Q. Linda Be Good. A. Was released or screened in November, 1947.

Q. Were either of those pictures available when you played these two? A. No, neither of them were.

Q. Let us go to the next category. A. I didn't play any pictures——

Q. You aren't in that one at all. Let us go to the next one, category 8. You played 11 pictures that are listed in that category from the distributors listed in the first column. A. Well, in the group No. 8 there are a number of pictures which we played and a picture, an Eagle Lion, which we didn't play, which Eagle Lion picture was not available at any of the times that we played the pictures which we did play which are in this group.

765 The Court: Why didn't you play Trapped, an Eagle Lion picture?

The Witness: Why didn't we play Trapped?

The Court: Yes. Was there any particular reason?

The Witness: In comparison with these other pictures?

The Court: Or in comparison with any pictures you were playing at any time?

The Witness: I don't recall as to why we didn't play Trapped, specifically, except it might have been our opinion that—the opinion of our people that the picture wouldn't have done well for us. I don't recall the specific picture of Trapped, but I was only answering the question in relation——

Mr. Raftery: To availability.

The Witness: ——in comparison with the other pictures.

The Court: I notice from Plaintiffs' Exhibit 11 that Trapped, although it apparently didn't play on either the RKO or Loew circuits, had a New York metropolitan film rental of $21,100.

The Witness: I don't know the history of that.

766 The Court: Do you know where it did play, if it didn't play on either of those circuits, and got what apparently was a very substantial film rental from the New York metropolitan area?

The Witness: It might have been sold to other theatres —it must have been sold to other theatres.

The Court: It must have been.

The Witness: Yes.

Q. Category 9, Western Union seems to be the only picture listed that played at RKO. When did that play? A. June of '47.

Q. And these Eagle Lions, when were they released? A. One in August 1949 and one in December 1949.

Q. Have you also looked up your records to find out if, during any of these periods, you were playing some Eagle Lion pictures, and when I say "these periods" I mean availability periods of these Eagle Lion pictures? A. Yes, I took the trouble to do that. In the first group, Group No. 1, is a picture, Tornado Range, which I said we wouldn't have played even if it were available at
767 the time we played Shark Island, but at the time that Tornado Range was—about that time that Tornado Range was released, we did play a picture from Eagle Lion called Green For Danger, and we played that on the long half, second feature. I don't have the film rental, but it was a substantial film rental.

In the second group, in the period of June 1948, we played an Eagle Lion picture at that time called Philo Vance Returns.

In the third group where we played I Became a Criminal, in December 1948, the other two pictures of Eagle Lion were not available at that time, and again repeating that I would not have played Star Over Texas or Shamrock Hill were they available, it happens that in relation to a picture like Star Over Texas, which was released in December of 1946, we played some Eagle Lion pictures in and about that time. We played a picture called Queen of Burlesque as the second feature on the long half and paid substantial rental, and on October 29th, just about that period, we played two pictures from Eagle Lion, Mask of Dijon and Caravan Trail.

In the next group, a picture we played was a show Hatchet Man and Farewell To Arms in 1949, and they are comparing them with two pictures, one which
768 was released in 1948, December, called Old Fashioned Girl and Heartaches, which was released in 1947.

In 1948, December of 1948, about that time, we played a show from Eagle Lion, Canon City and Raw Deal, and paid very substantial film rental.

In the next group, they mention a picture called Down Memory Lane. The picture was screened by us in August of 1949. The picture that we played in that group was played in July 1948, and the other picture was not out at that time and it is a type of picture I would not play had it been out at the time. It consists of a group of a conglomeration of film clips of W. C. Fields and Bing Crosby. The fact of the matter is that——

Mr. Wright: What is the picture he is talking about?

A. (Continuing) Down Memory Lane, which was part of what was turned over to United Artists, and the picture still hasn't played.

In the next group we played a show in June of 1948 called I Wake Up Screaming and Blood and Sand, with which we did a very fine business, and the one show that was available at that time, called The Spiritualist,
769 we felt was not suitable for our needs and we didn't buy it, and on the show that we did buy at that particular time, which is mentioned, we played the show for two days, mid-week, "mid-week" meaning not including a Saturday or Sunday—and grossed a very comfortable figure of $79,000 in two days. I mean $79,000 in two days compares with a gross on one of the so-called top pictures of Eagle Lion which we played five days including a Tuesday, Wednesday, Thursday, Friday and Saturday——

Q. Six units? A. Five days including a Saturday, and during which period we grossed $130,000. Here is a pic-

ture that plays two days in June of 1948 and we grossed $79,000.

The Court: I think I understand.

I am interested in this. Several of these pictures which grossed large amounts nationally and which were not played on the Loew's or RKO circuits apparently got very high New York metropolitan film rental.

The Witness: I haven't got that schedule.

The Court: Does that indicate, Mr. McGovern, that the film rental from the New York metropolitan circuits
770 would be substantial even though they did not play upon the RKO and Loew's circuits?

Mr. McGovern: I think if you will take them up picture by picture, your Honor, you will find while they look substantial up there, they do not hold a candle to what would have happened had they gotten Loew and RKO circuit treatment. I think Mr. Schwartz's figures indicate that.

The Court: I was looking at some of these here. Guilty of Treason, for example, is one you mentioned which had a national gross of about $416,000, New York metropolitan rental of $22,300. Apparently it did not play at the Loew or RKO circuits.

Black Book, that had a national film rental of $365,000, had a New York metropolitan film rental of $23,400, although it did not play the RKO or Loew's circuits, which, on the face of it, would look as though there were a market for films which had a good rating outside the Loew's and RKO circuits.

I am interested in that point particularly.

Mr. Gillespie: Your Honor, we expect to have some proof on that subject.

The Court: All right. I did not know. I just dug that out myself. I was comparing some of these figures
771 on the charts the witness testified to with the figures on Exhibit 11. All right.

Mr. McGovern: Let me give you an example of what

we are talking about, your Honor. I am saying by just dint of going out of our swivel chairs and selling every little cat-and-dog house you could, we did establish, of course, some market here for our product, but you mentioned one picture that grossed around $400,000 of Eagle Lion's.

Just looking at this sort of hit-or-miss, here is a Warner picture, Dust Be My Destiny, a reissue, which did $428,000 nationally, and the only equivalent figure I have here is $80,900 out of the exchange area. We haven't got a breakdown for the metropolitan area, but I think it gives you an idea of what does happen when you do play these circuits.

The Court: I see. The reason I raised it was I got the impression from what was said in the early part of this trial that if a picture did not get on either the RKO or Loew's circuits, they did not get any of the other theatres either, and therefore there was not much chance of getting a substantial revenue out of the New York metropolitan area.

Mr. McGovern: We still contend, your Honor, if you do not get on the two circuits, you haven't got
772 any chance of realizing the real exploitation possibilities of that picture. You can do some selling in New York. There is no question about that.

By Mr. Raftery:

Q. Now, Mr. Schwartz, his Honor mentioned Guilty of Treason. You did not play Guilty of Treason? A. No.

Q. Will you tell us the reason why. A. Well, Guilty of Treason was a picture with a limited religious background, the story of Cardinal Mindszenty. I went to see the picture. In fact, I attending a screening over at the Waldorf Astoria with Cardinal Spellman and some of the members of the Church, and we just felt we did not want to play this particular type picture in our theatres, that we had more entertainment.

I assume in some areas that brought up this figure of $416,000, as I explained yesterday, there are some areas in the country, geographically, geographical areas and religious areas, with a predominance of one faith or another, where a certain type picture—a Martin Luther picture will go into one area and do a fantastic business and go into another area and do no business at all. A picture
773 like Miracle of Fatima will do well in some areas and not well in other areas. A picture like Pinky, Gentleman's Agreement, that kind of a picture has a particular appeal, and the national gross in no way universally establishes the desirability for the picture in New York or any other particular area.

Q. In the New York area, did you consider this picture as a controversial picture that might cause controversy among your patrons? A. We try to avoid pictures of this type. We have had some experiences.

Q. His Honor has observed that in the metropolitan area it is possible to play a picture even though you do not play in the RKO and Loew circuits and come out with a good result.

Can you tell us some examples in the very near past? A. Almost for the identical reason that I just said, there was a picture recently and there were some in this particular period that played this way. The most recent instance is The Moon Is Blue. The Moon Is Blue was produced and released through United Artists, and because of the subject matter, which was a little on the
774 delicate side, and the Production Code people, that is the governing agent of Hollywood, who watches over the morals and so forth, they decided that the picture would not be worthy of a Code seal as their stamp of approval, and so they denied it a Code seal. It also met with the disfavor of the Legion of Decency, which is, as you know, a group set up by the Church for the judging of pictures.

Our policy—we have not played pictures—we won't

play a picture that does not have a Code seal or Legion gives a little bit of trouble to. So we did not play the picture. The picture did not play, I know, in the Loew circuit in New York, and I know it played. It played in a tremendous number of theatres. It did fine business, much to my annoyance, but it did a wonderful gross business in many of the other theatres in the very neighborhoods in which we, the RKO people, have theatres.

Theatres right next door to us played this picture, and some of them played it for a longer period than I might have played the picture had I even played the picture. Some of them played it for two weeks, three weeks, one week, and did very well.

I think you will find that the national gross of The Moon Is Blue as relates to the metropolitan area
775 gross of The Moon Is Blue was very satisfactory.

The Court: I think I understand.

Q. And that also applies to pictures like French Line, I Am A Camera and many others? A. It has just been released. I talked only Saturday with the man who distributes the picture. I was interested because we did not play the picture. I know it did not play the Loew circuit, but it did play a group of theatres. He told me—he is in charge of the distribution—that in this area he will gross $80,000 for a picture that nationally has done $600,000.

The Court: I think I understand.

By Mr. Raftery:

Q. You were familiar with the national grosses of pictures from 1946 to 1950 generally? A. Generally.

Q. Was $500,000 a high gross for a feature picture? A. Not in that period.

Q. What was considered a fairly good gross for a feature picture? A. Starting with the period of 1946 and
1947, those were the two best years of the period
776 that we are talking about, there was some decline in 1948, 1949 and 1950. Our business went off, as the records will show. Pictures grossed $3 million, $2

million, $1.5 million, $4 million, $5 million. It seemed for a while there was no top with the real good pictures.

Q. And the pictures that you had your troubles with in exhibition were the pictures that grossed from $500,000 or $600,000 down?

The Court: That is a leading question.

Mr. Raftery: I will withdraw it. That is all.

The Court: Any cross-examination?

777 Recross-Examination By Mr. Wright:

Q. Mr. Schwartz, in your reference to these Eagle Lion pictures that you said you played here—I think you gave us some names—were you saying that the reason you did not play these Eagle Lion pictures that are listed on Exhibit 27 was because you played some other Eagle Lion picture at the same time? Is that what you are telling us? A. I didn't say that.

Q. Go ahead. A. I am trying to say what I did say. I was trying to look at a schedule and show that the schedule did not compare things, as I would put it, in a fair manner.

In other words, when you show a picture that grosses—you are trying to bring out a point that we played a picture that grossed nationally $58,000 and we did not play a picture of yours that grossed nationally $58,000, and I was trying to show that there was no comparability as to the pictures themselves. I was trying to show that there was no similarity in availability of the pictures, and I mentioned as a point of information that at the date or about the date, in the area of the date of when the

778 pictures which you listed for comparison purposes that we did play an Eagle Lion picture. I didn't say that because we played that we did not play the other one, because we wouldn't have played some of the others under any circumstances.

Q. The fact is that you did not play the Eagle Lion pictures in your circuit at the time they became available

as a general rule, did you? A. At the time they became available?

Q. Yes. A. Well, I was trying to give you the dates of screening and releases. That is the only thing I can give you.

Q. See if you can answer the question. The Eagle Lion pictures you did play, you played long after availability, didn't you? A. Not always.

Q. Well, in general? A. I can't answer that accurately.

Q. According to what we have here, the ones that were put in evidence by the witness who preceded you, you played Destination Moon approximately five months after it finished the Broadway first-run. Didn't you? A.
779 If you have the record; I don't have it. You said yesterday it played sometime in August and we played it in January.

Q. And Red Shoes you played more than two months after it had finished its Broadway run at the Victoria; is that right? A. We might have.

Q. Those figures sound right to you? A. I don't have that figure of Red Shoes or Destination Moon.

Q. And Jackie Robinson? A. Jackie Robinson, with the agreement of Eagle Lion representatives, we felt that we could get for Eagle Lion and for RKO, and first for RKO, a better result by playing it at a time we thought we could do a good job, and we did a good job. I think that has been acknowledged by the Eagle Lion people.

Q. But the time you played it was approximately three months—— A. We play he picture at a time we think we can do the best job for it.

Q. Let me finish the question. I would appreciate it, Mr. Schwartz. A. I am sorry.

780 Q. The time you played it was actually about three months after it became available? A. Yes, sir.

Q. And on the other pictures that were shown on that exhibit, Canon City and Raw Deal, those were actually played in your circuit, were they not, about five months

after they finished—— A. I don't recall. I know when we played the picture. I don't recall the first-run date.

Q. It is pretty clear from that, isn't it, that unless there was some kind of a quota arrangement—— A. Unless there was some kind of a what?

Q. Unless there was some kind of a quota arrangement where you were supposed to play only so many Eagle Lion pictures at a particular time, the fact that you played one at a time when another was available would not prevent you from licensing the other at all, would it?

The Court: Would you read that question back again? It is rather involved.

Mr. Wright: I will withdraw it. It is argumentative.

The Court: You will withdraw it?

781 Mr. Wright: Yes.

The Court: I did not understand it myself.

Mr. Wright: That is all.

Mr. Raftery: There is one question.

By Mr. Raftery:

Q. I think I asked this yesterday, but to make sure I want to get it.

Did you have any agreement with Loew's to divide Eagle Lion product between the Loew circuit and the RKO circuit? A. No, sir.

Mr. Raftery: That is all.

(Witness excused.)

The Court: Next witness.

Mr. Raftery: I am not going to call any more, I think, your Honor, unless something adverse develops during the Loew case. I do not want to rest.

The Court: In that case, you will want a reissue, is that it? All right.

782 **Joseph R. Vogel**

called as a witness in behalf of defendant Loew's, Inc., being first duly sworn, testified as follows:

Direct Examination

By Mr. Gillespie:

Q. Mr. Vogel, where do you live? A. New York City.

Q. What is your present occupation? A. I am president of Loew's Theatres, Inc.

Q. How long have you been president of Loew's Theatres, Inc.? A. Since September, 1954.

Q. And what was you occupation just preceding that? A. I was vice-president of Loew's, Inc., which is the parent company.

Q. And how long had you been vice-president of Leow's, Inc., approximately? A. About 12 years.

Q. And what were your duties generally speaking prior to the time that you became president of Loew's, Inc.—I beg your pardon—president of Loew's Theatres, Inc? A. I was vice-president of Loew's, Inc. and then I was a director of Loew's, Inc., and I was particularly
783 in charge of the theatre operation in the United States and Canada.

Q. How long were you in charge of theatre operations in the United States and Canada? A. Since December, I think, 1945.

Q. And that was all of the theatres of Loew's, Inc. throughout the United States and Canada? A. Yes, sir.

Q. From that period down to the time that you took over as president of the Theatres Company? A. Yes, sir.

Q. Now, prior to that time, what was you occupation? A. I was in charge of the Loew theatres out of town, outside of the metropolitan district of New York City.

Q. That covered the theatres around the country? A. All around the country.

Q. Outside of the metropolitan area? A. Yes.

Q. How long have you been in the motion picture business, Mr. Vogel? A. Since I have been 13 years of age.

Q. And what was your first job in the motion
784 picture industry? A. I was a part-time usher.

Q. What? A. A part-time usher.

Q. Would you tell us just briefly what you did after that, how you came along? A. Well, I did everything in the theatre, I guess, but play a musical instrument, and I became a manager of a theatre when I was about 19 years of age and then I became a district manager and then assistant to the man who operated the theatres outside of New York City, and then I took his place and became in charge of the theatres outside of New York City until the present position today.

785 Q. So that prior to that time, December, 1945, that you have mentioned, for that period of, oh, what, ten years or so, you were on the out-of-town theatres? A. Yes.

Mr. Wright: What was that date?

Mr. Gillespie: December 1945.

Q. Will you tell us Mr. Vogel, the circumstances under which you changed from the out-of-town theatres to being in charge of all Loew theatres? A. The vice-president and treasurer of our company died and the man who was in charge of the New York theatres took his position, and the both positions, his and mine, were combined, and I was put in charge of all the theatres.

Q. Turning your attention to this period from the time when you became in charge of all Loew theatres, that is commencing in December, 1945, did your duties include the supervision of booking and buying pictures for New York and metropolitan theatres? A. Yes, sir.

Q. Would you tell us in general and in some detail just exactly what the Loew's Theatres management does in respect of buying and booking pictures, just how
786 they carry it out? A. We have a projection room on top of the State Theatre Building, and some of

the publicity men in the booking department and operating heads go to the projection room every day at 2 o'clock, and we look at a picture, at least one picture every day. After the picture we have discussion about the picture—in many instances discussion as to whether we should play the picture, or how we are to play it, or where to play it, as a top picture, as a secondary picture, as a second-feature, or as a part of two-day play, which is minimum playing that we have in our theatre.

Q. Let me interrupt you just a moment. Who were the persons who do this screening that you have described? A. Mr. Picker, who is vice-president of the company, in charge of the New York theatres, Mr. Murphy, who is vice-president of the company in charge of the out-of-town theatres, Mr. Emerling, who is the head of our publicity department, and Mr. Joel, and Mr. Levy, and Mr. Arnswalde of the booking department.

Q. You referred to Mr. Picker and Mr. Murphy as vice-presidents in charge of metropolitan theatres and out-of-town theatres. That has been just since the
787 Loew's Theatres Company has been set up? A. That is right.

Q. They took those offices when? A. When I was in charge of all the theatres, they were my assistants, each one having a certain division.

Q. But you yourself supervised this buying and booking of pictures? A. Yes, sir.

Q. You yourself personally attended screenings, I take it? A. I attended screenings. Looked at a picture most every day. If I miss a picture in the projection room, I may see it at night or next day may screen the picture so I can see the picture I missed. If the consensus of opinion is that the picture is no good and nobody gave any thought to it playing as a top picture, sometimes I don't view the picture.

Q. But the others do? A. Yes, sir.

Q. And then you discuss with them about where you will play that picture and other pictures that you have screened? A. We then discuss terms we are willing to pay and also how the picture is to be played at our theatres.

788 Q. After you had done this screening of the pictures—of a particular picture, would you tell us how negotiations are carried out with a distributor. A. Well, all different ways. Sometimes we wait patiently for a picture that we hear is very good, we keep bothering the film company to view it so that we can decide how much we want to pay for it. Sometimes the film company calls and says the picture is here and we would like you to look at it; we want to sit down and talk to you about buying it.

Done all different ways. Each company has a different method. Sometimes the companies are anxious for you to buy it, sometimes they are not too anxious. If they have a very good picture, they are very anxious. If it isn't too good, they bother the life out of you.

Q. Now, can you tell us, in screening these pictures and negotiating, do you screen and negotiate for the pictures of all distributors? A. All distributors, yes, sir.

Q. That would include? A. We buy pictures from every distributor, all distributors' pictures.

789 Q. That would include Paramount, Loew's, Metro-Goldwyn-Mayer, Universal, United Artists, Columbia, RKO, Warner— A. Warner, yes.

Q. —Fox, Eagle Lion? A. Republic.

Q. Monogram? A. Yes, sir.

Q. Allied? A. Everybody.

Q. Do you carry out this screening and negotiating with these distributors on substantially the same procedure or under the same procedure? A. Exactly the same procedure.

Q. And— A. As far as we are concerned.

Q. Correct; and you deal with them—you deal with Eagle Lion, the plaintiff here, just the way you deal with

any of the other distributors? A. We dealt with Eagle Lion. Don't any more.

Q. That is correct. Thank you for correcting me. During this period of 1946 to 1950 that is involved in this suit, you dealt with them in just the same way you dealt with the other distributors? A. Yes.

The Court: Let us cut out some of the leading questions. Let the witness do the answering, rather than asking a question and letting him say Yes or No. I would
790 rather the testimony came from the witness than the attorney.

Mr. Gillespie: Quite right. I was trying to move it forward.

The Court: I know that.

Mr. Gillespie: I apologize.

Q. Mr. Vogel, have you had prepared from the records in your office a list of the Eagle Lion pictures which you have screened duing this period of 1946 to 1950? A. It is a list—I am not sure whether I screened all of them, but I am sure I screened most of them, with the exception of those which were definitely decided to be short-half pictures, but most of the others I have screened myself.

Q. Then I show you a list and ask you if this is a list of the pictures that were screened by Loew's during this period of 1946 to 1950. A. Yes, this is the list that was made up at the office.

Q. Is it correct and true to the best of your knowledge? A. Yes, sir.

Mr. Gillespie: I offer that in evidence.

791 The Court: Any objection?

Mr. McGovern: We would like to see it, please.

May I ask Mr. Gillespie or Mr. Vogel, what does the plaintiff number refer to? Is that the number we have of the list?

Mr. Gillespie: The plaintiff's number, your Honor, was just a means of, perhaps, trying to get more quickly to this Plaintiff's Exhibit 11 if at any time—

Mr. McGovern: That is the order?

Mr. Gillespie: That is the order. There isn't any specific number but I found out it was a little easier in trying to get back and forth to it that we put that number on.

Mr. McGovern: Your Honor, we won't object to the exhibit for showing what it shows, but we would like to have access to the basic record from which it was taken, for this reason: we would be quite concerned with the actual screening date, for one thing, such as we have on the RKO exhibit. There is no way you can tell from this piece of paper, which I take it is simply a rough, secondary record, when the picture was actually screened.

The Court: That is something you can go into. Then we will admit the exhibit in evidence.

792 (Marked Defendant Loew's Exhibit C.)

By Mr. Gillespie:

Q. Mr. Vogel, have you had prepared from the records of Loew's a list of the Eagle Lion pictures, of the 196 pictures which appear on Plaintiffs' Exhibit 11, that were exhibited at one or more Loew's theatres? A. Yes, sir.

Q. I ask you this is that list? A. Yes, this is the list.

Q. Does that list show the number of Loew theatres in which each of these pictures showed? A. Yes, sir.

Q. Was that prepared from the records of Loew's? A. Yes, sir.

Q. Is it true and correct to the best of your knowledge? A. Best of my knowledge, yes, sir.

Mr. Gillespie: I offer that in evidence.

Mr. Wright: Could we have copies of these at the time we are offered?

Mr. Gillespie: I will try to get you a copy, Mr. Wright.

Mr. McGovern: We have no objection to this exhibit, your Honor.

793 The Court: All right, received.

(Marked Loew's Exhibit D.)

Q. Mr. Vogel, have you had prepared from the records of Loew's a schedule showing the pictures of all distributors exhibited at one or more Loew theatres during this period of 1946 to 1950 including the Eagle Lion pictures not only within the 196 but those that might be outside that number? A. Of all the pictures, everybody's?

Q. That is correct. A. Every picture released?

Q. Of the number. A. Of the number? Oh, yes, sir. Excuse me. I thought you meant the names, titles.

Q. No, the number. Is that the list that you have prepared? A. Yes, sir.

Q. Is that from the records of Loew's? A. Yes, sir.

Q. And is it true and correct to the best of your knowledge? A. Yes, sir.

Mr. Gillespie: I offer that in evidence.

Mr. McGovern: No objection.

794 (Marked Defendant Loew's Exhibit E.)

Q. Mr. Vogel, I would like to direct your attention to the pictures distributed by Eagle Lion, as to which there has been evidence here, that they grossed more than $500,000 nationally. The evidence here shows that there are 18 such pictures and I would like to direct your attention for a moment to those of the 18 pictures which played first neighborhood run in the Loew's theatres, and for the purpose of refreshing your recollection, I hand you a schedule.

Mr. Gillespie: Perhaps I might have this marked for identification.

(Marked Defendant Loew's Exhibit F for identification.)

Q. Mr. Vogel, I direct your attention to the picture T-Men. Could you tell us how that picture and the picture Out of the Blue played in the Loew theatres. A. T-Men played as a top picture, long-half; and Out of the Blue played as a second feature on the long-half.

Q. How many Loew theatres altogether did those two pictures play in as a show? A. 60.

795 Q. Can you tell us the consideration which you have to playing those pictures in the respective positions that you did? A. Well, I am sure we didn't play these pictures—T-Men on the long-half because it was a big picture or because there were any stars in the picture. We played the picture with the idea of giving Allied or Eagle Lion a chance to play pictures at a time when possibly we had no great pictures about. I am sure that at the time we could have chosen something as good or better. We always endeavored—I have always endeavored to do—play as many pictures of Eagle Lion's as we possibly could. I pressed that on my people. It was a question of deciding as to where we were going to play the picture, but I did my utmost at all times to play as many Eagle Lion pictures as we possibly could. If they were of a quality that we felt we could play them in our theatres, we wanted to play them. T-Men was a nicely-made picture, I thought it was quite a good picture, it lacked star value, but I thought that it was a very good story, and we should give Eagle Lion a chance to play. I remember that picture particularly.

795a Q. Out of the Blue, I noticed that you played that as a second feature. What was the reason for your playing that as a second feature? A. To be truthful, I don't remember the picture exactly, but I have a feeling that it was a nice picture and not offensive at all and it would add something to a very good show, since the people who left our theatre would go out and say, "I saw a nice show at the Loew theatre."

796 Q. Do you know whether Out of the Blue had a first run? A. On Broadway, Out of the Blue, no, it didn't have a first run because it was the kind of a picture I don't think could have gotten any money, any film rental, and the film, to play it on Broadway, would lose money because advertising costs would far exceed any film rental they could possibly get for that picture.

Q. Would you please tell us the considerations that went into your selecting the show He Walked By Night, and Let's Live a Little. A. There again, if you compare the people, the cast, in both pictures, if you compare the cast, you compare—

Q. Let me interrupt you. Will you please tell us how you played that show. A. I can only repeat again we played the show because we wanted to play Eagle Lion pictures and give them a chance.

Q. Excuse me. Perhaps my question isn't clear.

How did He Walked By Night play, in what part of the program? A. It played as a top picture on a long half.

797 Q. How about Let's Live a Little? A. Played as a second feature on long half.

Q. In how many Loew theatres did that show play? A. Fifty-nine.

Q. Mr. Vogel, please tell us the considerations which led to your setting up the show that way. A. They were also, I am sure—I don't remember exactly—but I am sure they were pictures that we thought our audiences, those that came in, would enjoy, and it was a good evening's entertainment, but by no stretch of the imagination, did I ever think that those pictures, those two pictures together, would do a very good business in the circuit. Therefore, again, you have no big cast of any kind and no reason at all—neither one of these stories are universally known, they aren't plays, they aren't big books. They are two nice pictures and we decided we would play them because we wanted Eagle Lion to get some playing time.

The Court: Why did you want Eagle Lion to get some playing time?

The Witness: I have always, your Honor—there isn't an independent or a single producer who couldn't

798 play his pictures on the Loew circuit. We play everybody's pictures.

The Court: Do you pick the pictures so as to make sure that each independent company got on?

The Witness: No.

The Court: Or do you pick the pictures that you think will produce the most revenue?

The Witness: Pick the pictures that I think will produce the most revenue.

There are occasionally sometimes when there isn't too big a choice, when even the other companies who usually produce many big pictures haven't released anything that is outstanding. At that time we try our best to try to play somebody else's pictures whose pictures haven't ever attained the popularity of other pictures, stars particularly.

Q. Mr. Vogel, what is the reason that you have been interested in the independent producer and distributor? A. Well, all over the country, every single theatre that Loew has, in all the time I have had anything to do with the theatres, in many of our towns we only play Metro-Goldwyn-Mayer and United Artists pictures. United
799 Artists releases pictures only made by independent producers, and in quite a few of our towns we never played anything else but those Metro-Goldwyn-Mayer and the independent pictures. It is to the interest of everybody in our business to keep outside producers busy and do something for their pictures so they continue to make them. There is always a shortage of very good pictures, and the only way you can get good ones is to encourage many producers to make them.

Q. That is the reason? A. Yes, sir.

Q. For your interest in the— A. Yes, sir.

Q. —independent producer and distributor? A. And the people connected with Eagle Lion I thought were fine, responsible people, the president of the company and all the people I knew in the company. I did everything I possibly could.

Q. Will you turn to the next Eagle Lion picture of those that grossed in excess of $500,000 that played in the Loew theatres. I am referring to Tulsa. How did that play in the Loew theatres? A. Tulsa played as an equal picture

on the long half with another picture called Portrait
800 of Jenny. Those two pictures split. Instead of one being in the ascendency, each picture was treated the same. Apparently both got about the same film rental.

Q. Did they play the long half of the week? A. Yes, both pictures played the long half, equal billing.

Q. How many Loew houses did they show in? A. Fifty-nine.

Q. Would you tell us the considerations which led you to play Tulsa as an equal bill with Portrait of Jenny. A. We had played Tulsa at the Loew's Capital Theatre, which is an outstanding first-run theatre. It was a good picture, it was well made, but our experience with the picture was quite bad. We didn't do any business at the Capital Theatre, and we didn't feel that the public in New York City would respond to well, making the picture successful, and for that reason we didn't want to play it as a top picture, although we hadn't even decided that—I remember that picture too. We were negotiating for the picture. When we finally made the deal for the picture, we didn't make it with Eagle Lion, we made it with another distributor—another producer.

801 Q. Who was that? A. David Selznick Company.

Q. Will you explain the circumstances. A. David Selznick had a picture which he played also on Broadway. The picture was Portrait of Jenny. It played at the Rivoli Theatre and that picture did no business at the Rivoli Theatre either. They tried to get us to play it as a top picture, which we didn't want to do, and finally the head of our booking department and said that a representative of Selznick was presenting these two pictures, Portrait of Jenny and Tulsa, as a show, and we made a deal for it and bought it and played it that way.

Q. Will you tell us how you played Eagle Lion's picture Mickey? A. Mickey?

Q. Mickey, M-i-c-k-e-y. A. We played that picture as a second feature on the long half.

Q. What was the top bill of that?

Mr. McGovern: May I interrupt, Mr. Gillespie, to ask you did you mean to skip the next one there, State of the Union and Red Stallion?

Mr. Gillespie: I didn't. I am sorry. Thank you very much.

802

The Court: Which exhibit are you taking these from?

Mr. Gillespie: This is just a schedule, marked for identification. I should be very glad to let your Honor see it.

The Court: If you have an extra copy. I didn't know whether you were referring to some other schedule.

Mr. Gillespie: I am sorry, your Honor.

Q. Mr. Vogel, Mr. McGovern has called my attention to the fact that in going down this schedule I skipped a picture, Red Stallion. Would you tell us how that played in Loew's theatres. A. That played as a second feature on the long half in sixty theatres.

Q. What did it play with? A. It played with a picture called State of the Union, in which Spencer Tracy and Katherine Hepburn and Van Johnson were the stars, and Capra as the producer.

Q. Are those outstanding? A. They are all outstanding. The director is one of the best, and the stars are of top quality.

803

Q. Where did State of the Union have its first run? A. At the Music Hall.

Q. Where did Red Stallion have its first run? A. At the Gotham.

Q. Is that considered an outstanding first-run theatre? A. No, that is as low as a first-run theatre can be.

Q. Would you tell us the considerations which led you to play Red Stallion as a second feature rather than as a top feature. A. Our experience in New York has been that pictures that appeal to children are not the kind of picture that we can expect to do business in the evenings with grownups, and while the picture was a pleasant picture, it couldn't possibly become the top picture. It

wasn't anything that was controversial either. We felt that would be safe. I don't remember exactly what the picture was about, but I am sure we felt it was a nice little picture that could play with the top picture, State of the Union.

804 Q. Let us now go to Mickey and tell us how that played. A. Mickey also played as a second feature on the long half in 59 theatres with top picture Three Musketeers.

Q. Who were the stars in Three Musketeers? A. Lana Turner, Gene Kelly and June Allyson.

Q. Where did Three Musketeers play? A. At the State Theatre.

Q. That is a first-run theatre. Where did Mickey play? A. Also at the Gotham.

Q. What was the film rental for Mickey on first run? A. Nothing.

Q. For Three Musketeers? A. $105,000.

Q. Will you tell us how Ruthless played in the Loew theatres. A. Ruthless played as a second feature on a show which had Julia Misbehaves, both on top, long half, in 59 theatres.

Q. Where did Julia Misbehaves have its first run? A. At the Radio City Music Hall.

Q. How much film rental? A. $135,000.

805 Q. How much film rental did Ruthless develop on first run? A. $6,700.

Q. At what theatre? A. The Gotham.

Q. Will you give us the same information with respect to Northwest Stampede. A. Northwest Stampede played as a second picture on the long half to Connecticut Yankee, which also played at the Music Hall.

Q. What was the film rental at the Music Hall for Connecticut Yankee? A. $133,000.

Q. Where did Northwest Stampede have its first run? A. At the Globe.

Q. And what was the film rental for that? A. $1,800.

Q. Referring to that picture and Ruthless, will you tell us the considerations which led you to play those as second features rather than top bills? A. Well, the film company that sold those pictures sold them to the Gotham and the Globe, and I am sure at the time even the amount of money they spent for advertising showed us at the time that—what they thought of the picture. The
806 business of two first-run theatres certainly made us aware of the fact that we couldn't play it any other way but the way we played it.

Q. Mr. Vogel, will you please refer to the picture Red Stallion in The Rockies. How did that play in the Loew theatres? A. We played that as an equal billing picture with Kill Or Be Killed, and Red Stallion played at the Palace Theatre and Kill Or Be Killed played at the New York Theatre, which very seldom is a first-run theatre. The two pictures got $1400 as a first-run film rental.

Q. In your best judgment, did these Eagle Lion pictures that we have been referring to play to their best advantage from the point of view of the pictures as you knew them? A. Couldn't possibly do better for Eagle Lion than we did with these pictures. I think in some instances we stretched a point.

Mr. Gillespie: I wonder if we might take a short recess at this point.

(A short recess.)

807 By Mr. Gillespie:

Q. Mr. Vogel, I would like to refer you now to the remainder of the 18 Eagle Lion pictures with national grosses in excess of $500,000 which the evidence here shows did not play the Loew circuit or the Loew group of theatres first run, but the evidence shows played certain RKO theatres first neighborhood run.

Those pictures are Canon City, Raw Deal, Red Shoes, Destination Moon, Sundowners, Jackie Robinson Story, The Noose Hangs High and The Big Cat.

Did Loew's screen those pictures? A. Yes, sir.

Q. And did the Loew's organization have negotiations with Eagle Lion in connection with those pictures? A. I am sure we had negotiations for some of them. I am not sure about all of them.

Q. Did you at any time have any conversation with anyone at RKO about the licensing of those pictures or the pictures which were licensed first neighborhood run for the Loew theatres? A. No, sir.

Q. Did you know whether RKO were having any
808 negotiations with Eagle Lion in respect of any of these 18 pictures that we have been referring to? A. Well, we must always presume that there are other negotiations going on because we don't always see eye to eye as to how those pictures are to play and what the terms should be.

Q. You mean eye to eye with the distributors? A. With the distributors. And occasionally we talk about buying the picture and then there is no more talk about it because the film company sold the picture to somebody else.

Q. And that did occur in respect of certain of the pictures that you had negotiations for with Eagle Lion? A. Yes, sir.

Q. I show you Plaintiffs' Exhibit 11, Mr. Vogel, and refer you specifically to two pictures on the next-to-the-last page of that exhibit, or three pictures: one is Trapped, another is Black Book, and the third is Guilty of Treason. Do you know whether the Loew's organization had any negotiations with Eagle Lion or Eagle Lion representatives in connection with licensing those pictures for exhi-
bition in the Loew's theatres? A. I am not sure
809 whether we had extended negotiations with them, but I know that those pictures were sold away from us. Whether we negotiated or had offered a deal for the three, I can't be positive.

Q. I am referring to them separately. The first is Trapped.

Do you know whether you had any negotiations with respect to Trapped? A. Yes. On refreshing my memory, we did, and Trapped was sold away. I think it was sold to the Skouras, Frisch & Rinzler and other circuits in New York City.

Q. For first neighborhood run? A. First neighborhood runs. They have as many theatres as we have, and together they have as many theatres as Loew's or RKO has.

Q. How about Black Book? A. Black Book, the same thing.

Q. Mr. Vogel, at any time did Loew's or did you have any agreement, understanding or commitment with the distributor outside of the current film contracts that you had for exhibiting current pictures that you would exhibit additional pictures or all of the pictures of any dis-
810 tributor? A. No, sir.

Q. Did you ever have any contract whereby any distributor was obligated or under any commitment to furnish you with pictures? A. No, sir.

Q. Other than those that you had under specific contract? A. In these years?

Q. 1946 to 1950. A. No, sir.

Q. Did you at any time have any agreement or understanding or commitment with any other distributor, including RKO, that you would not license the pictures of any distributor or that you would license the pictures of any other distributor? A. No, sir.

Mr. Gillespie: Your witness, Mr. Wright.

By the Court:

Q. Did you have any understanding that one distributor would have a preference over another distributor? A. The only distributor that had a preference, and even there in many instances we had many differences, was Metro-Goldwyn-Mayer, our own company.

811 Cross-Examination

By Mr. McGovern:

Q. Mr. Vogel, it is true, is it not, that during this period of time Loew's had a great number of theatres outside the New York metropolitan area? A. Yes, sir.

Q. Could you undertake just briefly for the record to indicate the cities and towns where Loew's had theatres outside the metropolitan area, let us say in the year 1946. A. Boston, Springfield, Worcester, Hartford,—

Q. Can you, as you go along, from your recollection, give us the number of theatres you had in each of those towns? A. Boston, two; Worcester, two; Springfield, one; Hartford, two; New Haven, two—three—two now; three in Bridgeport; one in Meridan; one in Norwich; one in Providence; two in Syracuse; one in Rochester; two in Buffalo; one in Mount Vernon; one in New Rochelle; one in Yonkers, and one in White Plains; Jersey City, one; Newark, one; San Francisco, one; Kansas City, one; St. Louis, two; one in Atlanta; one in Nashville; two in Memphis; one in Houston; one in New Orleans; two in Columbus; three in Cleveland; one in Dayton; two in Toledo; one in Canton;

812 one in Akron; three in Washington; one in Wilmington; one in Norfolk; one in Richmond; two in Evansville; one in Indianapolis. I don't know whether I repeated myself. I don't remember any more. I think that is about it.

Q. That about exhausts the list, does it? A. I think so. Louisville. We haven't Louisville or Pittsburgh any more. We did have at that period.

Q. At some time in this period 1946 to 1950? A. That's right.

Q. How about Baltimore, Maryland? A. Yes, we had it during that period, too. We haven't any more.

Q. Were each of those theatres that you have mentioned first-run theatres in those towns? A. Yes, sir. We had two subsequent runs in Cleveland which we no longer have, but

durtng that period we had two subsequent runs in Cleveland.

Q. I am a little unclear, Mr. Vogel, from your testimony as to precisely what the respective managerial responsibilities were of the executives of the Loew circuit during this period of time we are concerned with.

Can we go back to the period now, 1946 to 1950, and
813 would you clarify for the record during that period of time precisely who was in charge of these out-of-town theatres as distinct from the New York metropolitan circuit. A. Well, under me, John Murphy, out-of-town, and Eugene Picker in town.

Q. In town, Picker? A. Yes, sir.

Q. Murphy, out of town? A. Yes, sir.

Q. But both of them operating under you? A. Yes, sir.

Q. Which one of those two men, unless they were both doing both functions, which of them was buying and which was booking for those circuits; can you tell us? A. They are both executives. They are really the general managers of their respective divisions, but in our company we all talk over film buys. There is no such thing as one person being the booker and one person having the say as to whether this picture should be bought or whether it should be booked a certain way.

We have meetings and it is the general concensus of opin-
ion. If they disagree with me, sometimes I give in
814 and sometimes I don't, but we talk over each booking with the exception of second features. I am talking about top pictures.

Q. With regard to the metropolitan circuits themselves, Mr. Picker would both buy and book in consultation with you? A. Yes, sir.

Q. And with regard to the theatres out of town, Mr. Murphy would perform that same function, again in consultation with you? A. Yes, sir.

Q. Was there anyone who had a supervisory position over yours in connection with the operation of those theatres? A. No, sir.

Q. During this period of time, what was the function of Mr. Moscowitz? A. Mr. Moscowitz was the vice-president and treasurer of the company.

Q. Did he have anything to do with the buying of films for the circuit? A. Nothing at all.

Q. Nothing to do with the booking of films? A. No, sir.

Q. Let me call your attention just briefly to
815 your Exhibit C, which purports to be a list of the Eagle Lion pictures that were screened by Loew's, and may I ask you, Mr. Vogel, if you would describe for us the type of records that Loew maintains with regard to these screenings. A. We sit in the screening room and a few of the boys in the booking department, not the executives, although I think occasionally Mr. Murphy and Mr. Picker, write a written report, but as a rule, we look at a picture and converse with each other after the picture is screened. We sit in the projection room and discuss the picture and we say, "Well, this looks like a great picture. We should play it a certain way" or "This is a picture we shouldn't play at all" for some reason or other, or "This is a picture that is all right for a two-day play or a second feature play."

Then we agree, and Mr. Picker or Mr. Murphy work out a deal if they can.

There have been many of the pictures where there are written reports, single reports written, as to the opinion of the people who attend the screening, but I don't make that a rule because if we discuss it at the time, that is the finish of it. Whether we have a report or not means
816 nothing because if we are not going to play the picture, or if we know and remember how we intend to play the picture, the report isn't too necessary.

Q. Yes, but when you go through this screening operation, what my question was addressed to was precisely what type of record do you make of the screening operation itself. A. I tried to explain. Sometimes we make no record. If we all agree that this picture is a great picture, probably no record is made.

Q. I assume you have a screening book, to begin with, don't you, which at least reflects the fact that the picture was screened? A. We don't have a book. I know we have a separate sheet upon which certain people indicate their preference for the picture or how they liked the picture.

Whether they make them out at every single screening, I really don't know, but I know we have many reports on many of these pictures.

Q. For example, you show here with regard to the first picture listed, Kit Carson, that it was screened. A.
817 We have a record that the picture was screened. That we have.

Q. That is the record I am talking about. A. They have some record there that the picture is screened, yes.

Q. That record would show what, if you know, over what appears on this exhibit? A. I imagine it would show the date it was screened.

Q. Would it show first the producer's number of the picture? A. I am not positive.

Q. You don't know? A. I don't think so.

Q. Would it show the release date? A. I don't think so.

Q. It would, in your judgment, show nothing except the screening date itself? A. The opinion of the person who wrote the report and then possibly some report there or some compilation of the dates and the times we screened certain pictures.

Q. But it would certainly reflect the screening date itself, would it not? A. Yes, sir.

Q. And then, in your recollection, it shows in
818 addition to that the judgment of the persons present who screened the picture? A. Most of the pictures which have no big stars or very many of them are pictures that maybe I would not screen at all. Those particular pictures I am sure there is a report on. Having not seen it myself, I would like to see the report on them. If there is a difference of opinion as to how the pictures play, I do send for those reports, and in those instances most likely I have not seen or screened the picture.

Q. Those reports, in addition to showing the screening date and the name of the picture and whatever relevant data there is, for example, the stars and so forth, would also reflect who the screening person was? A. That's right.

Q. And that would contain his evaluation of the picture? A. Yes.

Q. Those reports you do keep? A. Yes. They are kept in the booking office.

Q. Coming to your exhibit for identification—

819 Mr. McGovern: I guess this is in evidence now, is it, Loew's Exhibit D?

Mr. Gillespie: That is in evidence, I believe.

Q. Coming to your exhibit Loew's D, which purports to reflect the Eagle Lion pictures listed in Plaintiffs' Exhibit 11 and played by Loew's, that list, I take it on the face of it, purports to represent every play by any number of theatres in the Loew circuit of any Eagle Lion pictures; is that correct? A. Yes, this is a list of the pictures which played the Loew theatres and shows how many days those pictures played or how many theatres the pictures played.

Q. It shows how many theatres the picture played, does it not? A. Yes, sir.

Q. For example, No. 21 there reflects Philo Vance's Secret Mission, and it shows a play, does it not, in one Loew theatre? A. Yes, sir.

Q. It does not purport to show the length of the play in any of those theatres? A. No, sir.

820 Q. And it does not on the face of it, of course, purport to show the run which the particular picture got in that theatre, does it? A. No, sir.

Q. It reflects, does it not, Mr. Vogel, that the Eagle Lion pictures were exhibited in Loew theatres which range all the way from a single theatre up to 60? A. Yes, sir.

Q. And, for example, No. 49, T-Men, reflects, does it not, that it was exhibited in 60 Loew theatres, and that, I presume would be a contract for exhibition across-the-

board in the circuit. A. Well, it would be the maximum bookings.

Q. The maximum number? A. Yes.

By the Court:

Q. Do I understand you do not book for your entire circuit, then, when you buy a picture; you may book for five theatres or six theatres? A. Yes. The better the picture, your Honor, and the more sure we can get it, we try to buy for all theatres. If there is a picture we think will make money, we try to buy for more theatres.
821 If the picture isn't sometimes we play it in all our theatres because of advertising troubles and problems.

Q. How about some of these pictures like The Noose Hangs High, which played in 15 theatres; when you booked that, what did you book it for, the entire circuit? A. We did not. Its quality was the kind that our best theatres would not play that picture, and they were probably second-run theatres.

By Mr. McGovern:

Q. Mr. Vogel, coming to Loew's Exhibit E, and having in mind what you testified Loew's Exhibit D reflects, what you have done on Loew's Exhibit E, if I understand it correctly, is to add up all of the theatres in which any one of these distributors had a picture exhibited; is that correct? A. Yes, sir.

Q. In other words, going back to Loew's D, No. 21, Philo Vance's Secret Mission, which appeared and was exhibited apparently in only a single Loew theatre, that would be reflected as a single number over in the list that you have ascribed as Eagle Lion on Loew's Exhibit E, would it not? A. Eagle Lion?

Q. Yes. On Loew's E you show Eagle Lion with
822 20 feature pictures for exhibition in one or more Loew metropolitan sub-run theatres. A. Is that the year that this Secret Mission was released?

Q. I do not happen to know the year it was released. A. It makes a difference.

Q. I think it was 1946-47. It is the first one on our list.

Mr. Gillespie: Mr. McGovern, could I call your attention to the fact that Defendants' Exhibit D and Exhibit E, respectively, cover defferent pictures. D covers the 196 pictures, whereas E covers all pictures whether in the 196 or outside.

Mr. McGovern: I would be glad, Mr. Gillespie, to have the witness testify to what the fact is, because we only had 196 pictures. So how could you have some outside the 196?

Mr. Gillespie: I show some PRC pictures and Eagle Lion pictures that were outside the 196.

Mr. McGovern: I would like to see that in order to clarify this exhibit. Otherwise, I am not sure we understand what we are talking about here. I had assumed these were the same pictures.

823 Mr. Gillespie: They are substantially the same.

Mr. Raftery: It doesn't change the position.

By Mr. McGovern:

Q. Plaintiffs' Exhibit 11, Mr. Vogel, reflects the fact that the picture you have listed as No. 21 on your Exhibit D, Philo Vance's Secret Mission, which is shown as having been exhibited in a single Loew house, was released in the 1946-47 season.

Coming back to Loew's Exhibit E, which purports to reflect that for the year 1946-47 there were 20 Eagle Lion feature pictures exhibited in one or more Loew houses, I suggest that Philo Vance's Secret Mission is one of the 20 Eagle Lion pictures; is it not? A. I think that would be so, sir, yes, sir.

824 Q. In other words, none of the numbers set forth on the Loew exhibit E purport to differentiate between whether a picture was exhibited in a single Loew house or whether it was exhibited in 60 Loew houses; is that not the fact? A. That's right.

Q. Now, that would mean, then, would it not, that taking again the first column, 1946 to 1947, where you show 20 Eagle Lion films, that would mean, would it not, that you might in that 20 have several features for Eagle Lion that appeared only in a single Loew house, whereas up beside Paramount where you have 28 pictures exhibited in Loew houses, that not a single one of those appeared in less than 50 houses? A. Well, I don't think in that one year we played more than one or two pictures for as low a playing time as one day. There may be two pictures of the 20 that only played a day, but the others played more than one day.

Q. Let us get this straightened out on the record. Are we talking about playing time or the number of theatres in which a picture was exhibited? A. I mean theatres. I beg your pardon.

Q. There is nothing on Loew's D that shows playing time. A. I am very sorry. In 1946-47 I am sure that Eagle Lion pictures, most of them with the exception of maybe one or two, played more than one theatre.

Q. I point out to you at least one that we know did not play more than one theatre if Loew's Exhibit D is accurate. So I say to you again that in Loew's E for Eagle Lion you show 20 pictures which may have played in any number of Loew theatres from one up to 60? A. That's right.

Q. Now for Paramount you show 28 features exhibited which may all have played in 50 or more theatres? A. That may be.

Q. And yet the purpose of this chart, I take it, is to compare the treatment received by Eagle Lion product in the Loew circuit with the treatment received by Paramount product, isn't that it? A. It's possible—

Mr. Gillespie: Your Honor, the exhibits have stated right on their caption what the purpose is.

The Court: It states what they show, and what their purpose is, that is something that can be argued. The witness cannot testify about the purpose.

826 Q. It is also the fact, Mr. Vogel, is it not, that for a single exhibit of the picture shown as number 21 on your Exhibit D, Philo Vance's Secret Mission, which was exhibited in a single Loew house, that film rental on that picture may well have been anywhere from $50 to $100? A. Yes, but this doesn't in any way—

Q. I understand that. A. (Continuing)—show the quality of the pictures.

Q. That is the fact, is it not? A. Yes, sir.

Q. So that when you get over to Loew's Exhibit E, which shows, for example, 28 feature pictures during the year 1946-47 for Paramount and 20 feature pictures during that period for Eagle Lion, it is quite possible again that what you have there in the case of Eagle Lion is many features for which you paid three to four to five thousand dollars as against features for Paramount for which you were paying $150,000 or $200,000 in terms of film rental alone? A. I am not sure of the figures that you mentioned, but I know that the Paramount pictures, many of them, got very much more in film rental.

827 The Court: I think that is pretty clear when you compare Plaintiffs' Exhibit 22, which is in evidence, with Loew's Exhibit E, which shows the number of feature pictures that were shown had very little relevance to the amount of film rental which was paid to the distributors.

By Mr. McGovern:

Q. Mr. Vogel, I would like to call your attention to Plaintiffs' Exhibit 7 in evidence here, and that you will note purports to be the exhibition contract with the Loew circuit covering the picture T-Men and Out of the Blue to which you adverted in your testimony. A. Yes, sir.

Q. You will note, sir, that that license agreement provides as the principal term that "The exhibitor is to re-

tain the first $310,000 of the gross receipts of the circuit as per theatres listed on attached schedule A. The distributor is to receive the next $80,000 out of the gross receipts. All receipts over $390,000 are to be divided 50 per cent to the distributor and 50 per cent to the exhibitor."

Q. Now, can you tell us how that figure $310,000 was arrived at? A. If I remember correctly, Mr. Picker
828 had a discussion with whoever was the sales manager at the time—

Q. Do you know who it was? A. I don't remember.

The Court: Sales manager of Eagle Lion?

The Witness: Yes, sir.

A. (Continuing) And there was a discussion as to the quality of the picture and how much the picture would do, and I think they picked one or two pictures and averaged the business, deducting the film rental, with the idea that that film would then get the first monies that over amount, in other words, a certain figure, expenses and so on, would be taken out first, the film company would get all the money after that and then they would split 50-50.

There was a difference of opinion as to what the picture would do. Now, they picked some picture or a few pictures together and averaged the gross. That is how they arrived at it. I don't know exactly how they arrived at that, but I know that was the discussion between whoever sold the picture and Mr. Picker.

Q. I am still a little bit unclear as to precisely what your explanation means.

829 Did I understand you to say that first they were to take the house expenses out? A. I don't know whether they were exactly the house expenses, how they arrived at this 350 first. They arrived at some figure deducting film rentals out, and then paid the film rental.

Q. Are you talking about 310 or 350? A. 310.

Q. And you say your understanding is that they first arrived at some calculation of what the house expenses were for these houses in the circuit? A. No. Mr. Picker,

in making the deal, of course took into consideration his expenses and also in the discussion with this man they took previous pictures which had played in the circuit—I don't know which they were—and they arrived at some figure that T-Men would have to do before it participated in any film rental.

They took that film rental out that they paid some other company and then got down to this gross. That is why they gave the film company all the monies over $310,000 up to $80,000. After that figure was arrived at, the film company got it all before there was a split of 50-50.

830 Q. Can you tell us whether or not $310,000 as the first splitting point beyond which the film company gets its first revenue, whether that $310,000 would include a substantial profit to the circuit over and above house expenses? A. I am not sure of that because we don't—we now buy pictures theatre for theatre and we take expenses theatre for theatre. I don't know the aggregate. I never get to the aggregate as to how this works out. I couldn't tell you truthfully.

Q. Let me suggest, Mr. Vogel, that we have a list of these so-called theatre by theatre license agreements to which you just referred covering the exhibition of the picture Tulsa.

Now, you will note that in the case of each of these individual license agreements you have set forth there, do you not, a weekly operating expense— A. Yes, sir.

Q. (Continuing) —for the house involved? A. That's right.

Mr. McGovern: What I would like to suggest, if I might, your Honor, is I would appreciate if we could ajourn

831 at this point and if over the lunch hour (addressing witness) you would attempt to calculate from these weekly expenses what the total house expense for the circuit is on a play such as we had for T-Men.

The Court: I think if you have the data there you can compute it and put it in. I do not think you can ask

a witness to do your calculations for you or anything like that.

By Mr. McGovern:

Q. Let me suggest to you, Mr. Vogel, I have done the arithmetic. I am not a mathematician, I regret to say, but my arithmetic shows that for the theatres listed on this contract, the license agreement covering the exhibition of T-Men, that the house expenses set forth theatre by theatre on those individual or allegedly individual license agreements for Tulsa, that the total house expense comes to about $245,000. Now I assume you are sufficiently familiar with the circuit to be able yourself to pretty closely estimate what your total house expense would run on these theatres. A. I think your figure is wrong.

Q. You do? A. Yes. I don't think you have taken in office expense, which is a percentage of the gross
832 receipts. I don't know. I can't answer you definitely, so I prefer not to answer it.

Q. Then let us take just a look at that top Tulsa contract there. That is covering the exhibition of Tulsa in what theatre? A. 72nd Street.

Q. And the figure set forth there in the first column is styled as what? I am talking about the expense figure. A. $8,053.

Q. How it is styled? A. I don't know what you mean.

Q. What is the caption? A. "Weekly Operating Expense."

Q. The weekly operating expense? A. Right.

Q. Are you telling me that for the exhibition of that picture there were other expenses over and above the expense set forth there as the house expense? A. Well, I don't know. This is a deal that is different from a percentage from the first dollar.

Q. It sure is. A. So how they arived at this, I don't know. They can't figure the office expense before
833 they play the picture, so I don't know. Maybe he just set some figure or eliminated the figure. I don't

know. Generally we have an office expense, which is an expense which is a percentage of the gross receipts, and they differ with the gross receipts in addition to the actual operating expenses. Now, how this was made I don't remember.

The Court: What difference would it make, Mr. McGovern, in this case?

Mr. McGovern: We have a contract here to which Mr. Vogel referred covering the exhibition of T-Men and Out of the Blue, and it has this rather unique term that the exhibitor is to retain the first $310,000 of the gross receipts, and I am anxious to ascertain what percentage of that $310,000 figure would ordinarily be calculated as profit to the circuit before the distributor—

The Court: What difference does it make? Suppose it is 50 per cent, suppose it is 75, suppose it is 5. What difference does it make in this case?

Mr. McGovern: It makes this difference, sir: That if it appears that for an exhibition of a similar top feature picture Paramount or one of the distributors got a
834 term that reflected 25 cents on the first dollar from the first dollar of admissions paid at the box office all the way up with a breaking point somewhere above where they changed the percentage, that that type of contract, I suggest, is substantially different from this type of contract.

The Court: That is right. If you have something like that, then you have some relevant evidence, but it seems to me asking this witness as to what the house expenses were to show what the profit was in and of itself means nothing.

Mr. Gillespie: I might also point out that these two pictures are two years apart, Tulsa and T-Men.

Mr. McGovern: Yes, Judge, but I assume the houses' expense in 1949 were not less than they were in 1948.

Mr. Gillespie: There may have been a different way of computing them.

The Court: Are you going to compare this with the contract of one of the other distributors?

Mr. McGovern: That is what I hope to do. First I want to find out how the figure of $310,000 was arrived at. Mr. Vogel says it is a result of negotiation. I am sure it was not picked out of the air.

The Court: He says he does not know, as far
835 as I can gather, how that figure was arrived at.

The Witness: Yes, sir.

The Court: We will adjourn for lunch.

(Recess to 2 o'clock p.m.)

AFTERNOON SESSION—2.00 P.M.

JOSEPH R. VOGEL resumed.

Cross Examination continued

By Mr. McGovern:

Q. Mr. Vogel, isn't it a fact that in licensing feature pictures to play the top feature position on the long-half of the week at Loew that your license agreements normally accord to the distributor a share of the box office receipts from the first dollar up? A. Maybe in the majority of cases but not all.

Q. Can you think, for example, of a single instance where you played a Paramount picture top feature long-half of the week and the distributor did not share in the first dollar of box office admissions? A. I am not sure about Paramount but I know we had deals with the various companies predicated on 70 per cent of the profits, where you take out the expenses first, or some theatres where we take out our expenses and pay the film company
90 per cent of the profits. They aren't all percentage
836 deals. Some of them are on profit-sharing basis, some on other bases.

Q. You have different kinds of deals? A. Yes.

Q. I am asking you whether or not you can recall a

single instance where you exhibited a Paramount film, top feature long-half of the week, on Loew and you didn't have a license arrangement with Paramount that they would share in the first dollar of box office admissions? A. I think I remember one picture.

Q. Would you mention it. A. Was, I think, Samson and Delilah, one of the very—a big picture, either that year or the year after, that we had a percentage over a given amount.

Q. Will you describe the terms of that deal to us. A. I think it was 70-30. We were to receive 30 per cent of the gross, they were to receive 70 per cent of the gross, but we were guaranteed 10 per cent of the gross of the profit.

Q. Of the profit, but they participated in the first dollar of box office admission? A. Well, no—yes. They didn't participate in the first dollar if you didn't make 10 per cent.

837 Q. I understand that, but they had participated in the first dollar of the box office admission with reversion arrangement later on. A. If the picture is so bad that they think—you give them a film rental or have to guarantee a profit, which may create no film rental, but those pictures are so big that you feel you are not taking any chance. You are pretty sure you are going to pay them film rental.

Q. Specifically, coming back to your license agreements for the exhibition of Eagle Lion T-Men, can you recall a single license agreement with Paramount for the exhibition top-feature position, long end of the week, on the Loew circuit, where you ever extracted from Paramount an agreement whereby the circuit retained the first $310,000 of gross admissions? A. I don't think that there is any Paramount picture that we played that you could compare with T-Men. First of all, Paramount pictures, mostly had big stars, or the director was a big director, and they weren't nearly as much of a chance as a picture like T-Men. You can't compare one picture to another just by calling it a title. You have to, in your own mind, have a feeling

that this picture is a sure success. Many times pictures play around the country, you hear they are big
837a successes, and you aren't taking much of a chance when you buy the picture in New York.

T-Men, in comparison to most Paramount pictures, as to cast and producer, I cannot see any comparison. So you would be more careful about making a deal for T-Men than you would for some other picture with big stars and big directors.

838 Q. Yes, but in specific answer to my question you cannot cite us, can you, a single Paramount contract for the exhibition of a Paramount feature picture, top picture, long half of the week, on the Loew's circuit where Paramount ever agreed to give you $310,000 of the gross admissions? A. I am sure not, no, sir.

Mr. McGovern: Mark this, please.

(Marked Plaintiffs' Exhibit 29 for identification.)

Q. Mr. Vogel, I show you Plaintiffs' Exhibit 29 for identification, which purports to be a license agreement covering the exhibition of the picture, He Walked By Night, on the Loew's circuit, accepted on June 1, 1949, and ask you what were the rental terms of the exhibition of that picture (handing). A. "The distributor is to receive for each theatre 66⅔ percent of the gross receipts in excess of operating expenses and cost of second feature after deduction is made for New York City sales tax on film rental. In determining the film rental, each week shall be divided into 10 10 and the proportion of operating expense per theatre shall be computed 1 10 each for Monday, Tuesday, Wednesday, Thursday and Fri-
839 day, 2 10 for Saturday and 3 10 for Sunday. The cost of vaudeville, whenever played, shall be deducted from the gross receipts before computing film rental."

Q. That contract does provide, then, does it not, that the distributor is to receive for each theatre 66⅔ percent of

the gross receipts in excess of operating expense and the cost of the second feature? A. That's right.

Q. In other words, there was no film rental to the distributor until after the Loew's circuit houses recovered their expenses? A. That's right.

Mr. McGovern: I offer Plaintiffs' Exhibit 29 for identification in evidence, your Honor.

Mr. Gillespie: Is that the contract?

Mr. McGovern: That is the contract.

The Court: Do we need it? Is there anything more than that?

Mr. McGovern: Nothing more than that.

The Court: Why clutter the record?

By Mr. McGovern:

Q. Mr. Vogel, it occurred to me during the noon hour that when you were listing earlier this morning the Loew circuit theatres in cities and towns around the
840 country that I may have pinned down that recitation by you to the year 1946.

I take it that those theatres you did list were also owned by the Loew company in 1945. A. Yes, sir.

Q. And during the period 1946 through 1950. A. Yes, sir.

Q. In the course of your testimony in referring to those theatres outside New York, I believe you listed theatres in Mount Vernon, White Plains, New Rochelle and Yonkers; is that correct? A. Yes.

Q. Now, it is a fact, is it not, Mr. Vogel, that those theatres in Mount Vernon, White Plains, New Rochelle and Yonkers are bought and booked as a part of the New York metropolitan first-run neighborhood circuit? A. Yes, sir.

Q. And they are not in that sense, then, bought or sold in connection with these other out-of-town theatres that you mentioned? A. That's right.

Q. In other words, they are part of the circuit? A. Yes, sir.

Q. And those four theatres are playing the same
841 bill simultaneously with the other theatres in the circuit? A. Yes, sir.

Q. Let me ask you, Mr. Vogel, are you familiar with the term "the Loew's split"? A. I have heard it.

Q. Would you undertake to define it for the record for us, please. A. I really don't know how to define it. I just feel that it is a term used by some of the exhibitors in New York to distinguish the pictures that are played in the Loew theatres or in the RKO theatres. Most of the theatres which follow the Loew theatres or the RKO theatres play all the pictures. They play the Loew pictures, maybe starting on a Sunday and playing Sunday, Monday and Tuesday, or the RKO—the pictures which play in the RKO theatres on Wednesday, Thursday and Friday, and as the Loew's circuit and the RKO circuit which play these pictures on a first subsequent run, being, I imagine, the larger circuits, they term them "split."

The Loew's circuit and the RKO circuit and all those other theatres which play first run with the Loew people and the RKO people generally play the big pictures
842 a minimum of five days, so they play the lesser pictures on two days. The theatres which follow the Loew theatres, the second subsequent runs, play all the pictures that play the RKO theatres and the other runs, same runs, and also play the pictures which play in the Loew theatres and the theatres which are on the same run, and they have distinguished between the two as an RKO split and a Loew's split. I figure that is the reason they do it.

Q. Isn't it also the fact that the phrase refers also to the distributor's product being exhibited on the Loew or the RKO circuit? A. Well, some of the distributors play pictures in both circuits and you can't distinguish. You can't say that Paramount is on the Loew's split or Uni-

versal, or Columbia or United Artists plays pictures on both sides, the theatres that follow us. However, to distinguish those we call the Universal pictures which play Loew's, the Loew's split, and those which play RKO, I suppose they call the RKO split.

Q. Specifically, what distributors' product does the Loew's circuit, or, during the years in question, did the Loew's circuit ordinarily exhibit on the long half of
843 the week? A. Well, I think we have played every distributors' pictures if they were worthy on the long half—Warner, Fox—in some of our theatres, maybe not in all of them—Paramount, Metro, United Artists.

Q. Isn't it the fact that during the years in question here on the long half of the week the circuit played Loew's, United Artists and one-half of Universal? A. In the majority of theatres, not all the pictures. We played Fox pictures, Warner pictures in sixty-odd theatres.

Q. Let me call your attention, Mr. Vogel, to the testimony of Mr. Moscowitz back in the Paramount case in the hearings on remand in 1948.

Do you recall that testimony? A. I never read the testimony. I never appeared in that case.

Q. I think you did actually have some testimony go in in the form of a stipulation, did you not? A. The lawyers came up and got a stipulation. I signed it and that was all. I never appeared in the case.

Q. May I call your attention—

The Court: Are you going to call the attention of the witness to something he signed or testimony of
844 somebody else?

Mr. McGovern: The testimony I am calling his attention to is the testimony of Mr. Moscowitz, but it had reference to the position of Mr. Moscowitz in the circuit.

Q. He appeared in behalf of Loew's, is that not the fact?

The Court: You cannot get in the testimony of another man in another case by reading that testimony and asking this witness if he agrees with it.

Mr. McGovern: I am not trying to get in the testimony of another man. What I am trying to do is to refresh this witness's recollection, your Honor, by the testimony of another witness who appeared in the Paramount case on behalf of Loew's, Inc., mind you. This is not hearsay.

The Court: You want him to read it and not for the record?

Mr. McGovern: No, sir. I am asking him whether or not he recalls that Mr. Moscowitz did appear.

The Court: Do you know whether Mr. Moscowitz appeared?

The Witness: I do not, sir.

The Court: He says he doesn't know.

845 By Mr. McGovern:

Q. Let me suggest to you Mr. Vogel, that the record in the case of United States of America vs. Paramount Pictures et al., in the United States District Court for the Southern District of New York, reflects that at the hearing on November 8, 9, and 10 of 1948, one Charles C. Moscowitz appears to give testimony in the following form—

The Court: That is not evidence in this case. How can you take evidence that somebody gave in another case and read it in here when the man is not present for cross-examination?

Mr. McGovern: Your Honor, this is testimony by a man who I am trying to get this witness to identify as a member of the Loew organization.

The Court: You can ask this man to admit that Moscowitz was a member of the Loew organization, sure, do that, but you cannot read the testimony of some other man who is not in this court and expect this court to consider that as testimony in this case.

Mr. McGovern: Your Honor—

The Court: You can call Mr. Moscowitz, I suppose, if he is still alive.

Mr. McGovern: There is this point about it, I
846 think, Judge Dawson, and that is the testimony by any officer or agent of the Loew company at any time is an admission against Loew's.

The Court: Then what are you showing it to this man for? What admission do you think has been made?

Mr. McGovern: I was about to come at that, sir. I think the relevancy will appear.

Q. Let me ask you, Mr. Vogel, what was the position of Charles C. Moscowitz with Loew's in 1948? A. In 1948 he was the vice-president and treasurer of the company.

Q. What responsibility, if any, did he have for buying for these Loew theatres? A. None at all.

Q. Isn't it a fact that he did appear in the course of the hearings on remand in the Paramount case—wait until I finish the question—in the form of a stipulation as to what his testimony would be if he was called and gave that testimony, and did that testimony as so stipulated not reflect that he was in charge of buying and operating certain theatres in the Loew's circuit?

The Court: Do you know?

847 The Witness: I never read his stipulation, your Honor. I gave a stipulation. I never read any of that and I never attended at court.

Q. Let me ask you this. If Mr. Moscowitz appeared in the Paramount case and testified with regard to many of the theatres that are a part of this Loew's circuit we have been describing here in court today, and if he stated with regard to those theatres that they—

Mr. Gillespie: Your Honor, he is going to read this into the record.

The Court: You cannot put in the form of a question something which implies a fact which is not in evidence. That is objectionable and cannot be allowed. If Mr. Moscowitz made some statement and you want to call him and he is available, call him, or if you want to direct the Court's attention to something in the record of the

Paramount case to consider in connection with construing the decree in the Paramount case, the Court will take it into consideration, but as proof of a fact, you cannot ask this witness whether something that was said in a stipulation in another case is a fact in this case.

Mr. McGovern: Very well. We will deal with
848 this as an independent offer.

Q. Mr. Vogel, is it not a fact that during the years in question, namely 1946 to 1950, that the product of Universal was split between the RKO and Loew circuits? A. No, it was not.

Q. That is not a fact? A. No, sir.

Q. It is a fact, is it not, that testimony on behalf of yourself was introduced in the Paramount case back in the original hearings in 1945?

The Court: In the form of a stipulation?

Mr. McGovern: In the form of a stipulation as to what he would testify to, your Honor, if he were called.

The Court: Did he sign the stipulation?

Mr. McGovern: It was signed by counsel.

The Court: Do you know whether there was any stipulation?

The Witness: I signed a stipulation, your Honor, but about something that did not concern New York at all, because I knew nothing about New York. I signed a stipulation only concerned with the theatres that I at that time was in charge of.

849 The Court: If you have such a stipulation, of course you can show it to the witness.

Q. Mr. Vogel, let me see if I can refresh your recollection a bit as to what your's and Mr. Moscowitz's respective responsibilities were for the theatres you are talking about. That first paragraph on page 1850 of the record reads, does it not:

"It is stipulated that Joseph R. Vogel and Charles C. Moscowitz, if called as witnesses on behalf of Loew's, Inc., would testify that they have been in the employ of Loew's,

Inc., and its predecessors since October 10, 1909, and January 20, 1913, respectively; that both of them are presently vice-presidents of Loew's, Inc., and that the said witnesses had between them the entire supervision and control of the 131 theatres presently operated by Loew's, Inc., throughout the United States."

Is that the stipulation that you signed in 1945? A. I think so.

Q. You do not see anything in there, do you, that indicates that Mr. Moscowitz and you did not have joint
850 control over those theatres? A. Well—

Mr. Gillespie: I would just like to point out this is in 1945, not in the later period.

Mr. McGovern: I pointed that out, I believe.

The Court: The witness can answer that.

A. Mr. Moscowitz and I together operated all the theatres, but we did not operate them jointly. Mr. Moscowitz's supervision was only over the theatres in New York. Mine was entirely outside. I don't think he knew anything about my operation and I knew nothing about his in the purchasing of pictures. We together operated all the theatres but not jointly; separately.

Q. In other words, then, it is not strictly true, you say, to say that the "witnesses had the entire supervision and control of the 131 theatres presently operated by Loew's, Inc., throughout the United States"? A. We did, but not together. In other words, while we operated all the theatres, he just operated his department, his part of it, and I operated my part of it, but together both of us operated all the theatres.

The Court: I think we are getting into a question of semantics, and what difference does it make?

Mr. Gillespie: That is just a reflection on my draftsmanship.

851 The Court: No, your draftsmanship is all right, but what difference does it make? Are you impeaching the credibility of this witness?

Mr. McGovern: I tried, as I said earlier, with regard to the testimony that was offered, your Honor, on the remand in 1948, at which time Mr. Moscowitz testified, to bring home as to Mr. Moscowitz, what responsibility, if any, he had over the circuit. I understand, then, that Mr. Vogel sort of disclaims any responsibility of Mr. Moscowitz for the theatres involved here, whereas in 1945 they apparently claimed joint responsibility.

Mr. Gillespie: Your Honor, I think—

The Court: I do not construe it necessarily means that at all.

Mr. McGovern: All right, let us pass on.

By Mr. McGovern:

Q. Mr. Vogel, at the end of your testimony, Mr. Gillespie asked you certain questions with regard to whether or not you had ever conspired to monopolize exhibition or to divide the product by agreement with the exhibitors and distributors and so forth. Do you recall those questions?

A. Yes, sir.

852 The Court: In this case?

Mr. McGovern: In this case today, yes.

Mr. Gillespie: I do not think I used those words, your Honor.

The Court: I do not think so either.

Q. You did respond to certain questions whether you had conspired with other exhibitors and distributors, didn't you?

The Court: I do not recall the word "conspired." I think there was a question of whether he had an agreement.

A. I was asked whether I discussed this with any exhibitor. Whichever way you ask it, I tell you very honestly and truthfully, no, not ever.

Q. Did you not, in the course of this stipulation to which we have just adverted, at that time testify, and I call your attention to your testimony appearing at page 1850 of the record:

"There is not now, and to the best of my knowledge, information and belief, there has not been any contract, agreement, understanding or concert of action between Loew's, Inc. and any one or more of the defendants with respect to any of the following matters:"

853 And then I point out that on page 1851 of the transcript, one of the following matters set forth is:

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants"

and further:

"The preventing or hindering of the distribution of motion pictures produced by so-called independent producers."

You do recall testifying to that effect in the hearings in the Paramount case in 1945? A. I didn't testify in the hearings. I signed a stipulation, and that was the finish of it.

The Court: You signed such a stipulation?

The Witness: Yes, sir.

854 Q. Mr. Vogel, isn't it a fact that during the years in question here, in 1946 to 1948, Eagle Lion complained to you during this period of the fact that the control by the RKO and Loew circuits in New York had presented a serious obstacle to the development by Eagle Lion of the possible exploitation possibilities of its own product? A. No.

Q. It is not a fact? A. No, sir. Each company, every company we do business with, up to date, complains constantly about the way they are treated, that we don't play their pictures the way we should, that we don't give them as much money as we should. They all complain. They never stop complaining.

The Court: Sound like lawyers.

Q. I am talking now about something more than merely bargaining in connection with negotiations. I am asking

you whether or not it is not a fact that you received a complaint from Eagle Lion complaining of the monopolistic control exercised by the RKO and Loew circuits in New York, which was brought to your attention as being the principle obstacle preventing the proper playoff of Eagle Lion product in this area? A. I don't think anybody ever said to me that we were monopolistic, that we tried to exclude anybody. Somebody may have complained to me about not getting good treatment, but I don't remember any film company or anybody I ever did business with telling me that I was excluding them from playing time, or terms which they weren't entitled to.

855

Mr. McGovern: I ask to have this marked for identification.

(Marked Plaintiffs' Exhibit 30 for identification.)

Q. Specifically, Mr. Vogel, let me ask you whether or not in August of 1948 you did not receive from Mr. Krim a letter in which he complained that the control of the New York first neighborhood run situation by the RKO and Loew circuits was preventing the proper playoff of Eagle Lion product in this area? A. I don't remember that he complained that way. I remember that he complained or everybody complained, as I say, complained about not getting enough money for their pictures, and not getting enough playing time, but I don't think he ever accused us of excluding Eagle Lion.

Q. Let me show you what purports to be a letter from Mr. Krim to you, dated August 21, 1948, which has been marked as Plaintiffs' Exhibit for identification No. 30, and I ask you whether you recall receiving that letter? A. Doesn't say anything—he doesn't—

856

The Court: Do you recall receiving that letter?

The Witness: Yes, sir.

Q. You do recall receiving it? A. Yes, sir.

Q. What if anything did you do about it? A. I am sure I answered it.

Q. Do you have a copy of your answer, Mr. Vogel? A. I haven't. Maybe our—

Mr. Gillespie: Is this a copy of your answer, Mr. Vogel?

The Witness: Yes, sir.

Mr. McGovern: Your Honor, I offer Plaintiffs' Exhibit 30 for identification into evidence.

The Court: Any objection?

Mr. Raftery: I object to it as not binding on RKO in any respect.

The Court: All right. We will take it only as against Loew's then.

857 Mr. Gillespie: No objection as far as Loew's is concerned.

The Court: Received in evidence.

Mr. Gillespie: Providing the reply can go in.

The Court: Have you any objection to the reply?

Mr. McGovern: I have no objection to the reply. I haven't seen it, but I have no objection to it.

The Court: Put it in as one exhibit.

(Marked plaintiffs' Exhibit 30 in evidence.)

Mr. McGovern: That is all, your Honor.

The Court: Any redirect?

Mr. Gillespie: I have one or two questions.

Redirect Examination

By Mr. Gillespie:

Q. Mr. Vogel, does Loew's operate any theatres on Staten Island? A. No, sir.

Q. In Nassau County? A. No, sir.

Q. Referring to this letter that has been marked Plaintiffs' Exhibit 30, and specifically to the pictures that are referred to therein, Noose Hangs High, Raw Deal,

Canon City and Mickey, looking at Defendants'
858 Exhibit F for identification, can you tell us if those pictures had an exhibition in the Loew's or RKO circuits? A. The Noose Hangs High played in the Loew theatres. Mickey played at 59 Loew theatres. Raw Deal played at 36 RKO theatres, I see here on this list. And Canon City played 15 Loew theatres and 36 RKO theatres.

Mr. Gillespie: I am going to offer this, your Honor.

Mr. McGovern: No objection.

The Court: Both of these constitute F?

Mr. Gillespie: That is correct, your Honor. I turned them over to the plaintiff during lunch hour and they told me they would not object.

Q. Do I understand, then, that all four of those pictures played either the Loew's or the RKO circuits? A. Two of them played at least 59 theatres in the Loew theatres, and the other two played 15 Loew theatres and 36 Loew theatres, and the other one played, Raw Deal, the other one played 15 Loew theatres and 36 RKO theatres.

Q. So each one of those four pictures had an exhibition in the Loew or the RKO theatres? A. That is
859 right.

Q. And Raw Deal, how did it play? A. Played as second picture on the long-half.

Q. How about Canon City? A. Played as a top picture on the long-half.

Mr. Gillespie: That is all.

The Court: You are offering these schedules in evidence?

Mr. Gillespie: I am offering these schedules in evidence.

Mr. McGovern: No objection.

(Marked Defendant's Exhibit F in evidence.)

Recross-Examination

By Mr. McGovern:

Q. Mr. Vogel, may I ask you just one additional question? You mentioned Nassau County. I take it that the Loew

circuit does take clearance over Nassau County, does it not? A. No, Loew's circuit takes clearance over whatever theatre—we have one theatre in Jamaica which probably takes clearance—I don't think of any theatre in Nassau County.

Q. There is no theatre in Nassau County that you think of? A. Loew theatres?

860 Q. How far out does the circuit clearance go? A. Doesn't go out to any theatres in Nassau County. First-run may—maybe the Capitol does.

Q. We are talking about first neighborhood run clearance. A. No.

Q. No clearance into Nassau County? A. No, sir.

The Court: Next witness.

(Witness excused.)

Max E. Youngstein

called as a witness on behalf of defendant Loew's, Inc., being first duly sworn, testified as follows:

Direct Examination

By Mr. Gillespie:

Q. Mr. Youngstein, where do you live? A. 9 Mayflower Drive, Tuckahoe, New York State.

Q. What is your present occupation? A. I am vice-president of United Artists and a co-owner of the company.

Q. How long have you been—when were you first associated with the motion picture industry? A. About 16 years ago, Twentieth Century-Fox.

Q. What was the nature of your duties with Twen-

861 tieth Century-Fox? A. Originally I joined them through a subsidiary of theirs as an attorney and business manager.

Q. After you were with Twentieth Century-Fox what was your next association with the motion picture industry? A. I was with Fox for about four or five years, and then I was at the Treasury Department in charge of their

motion picture section for about a year and a half or two years during the war.

Q. What were the natures of your duties in that connection? A. My duties there were to create special events regarding war savings bonds, and I was in charge of their special events section having to do with the motion picture industry.

When the war was over I came back. For a short time I stayed at Twentieth Century-Fox as assistant director of advertising, publicity and exploitation. I then went into my own business, my own public relations business, for a short time.

Q. And then what did you do after that? A. In '46 I joined Eagle Lion Films as advertising, publicity and exploitation director.

Q. How long did you remain in that capacity?
862 A. A little over two years. And then I left and joined Paramount Pictures as vice-president in charge of advertising, publicity and exploitation, and a member of the board.

Q. Is that in May, 1949? A. Approximately May. I think it was around May, yes.

Q. Excuse me. I interrupted you. Then you said you went with Paramount Pictures? A. That is right, after Eagle Lion I left and joined Paramount Pictures as, I said, vice-president and a member of the board of Paramount distributing Company and in February, or perhaps early March, five years ago, I joined United Artists.

Q. And you are a member of the board of directors of United Artists? A. Yes, I am.

Q. And a part owner of United Artists? A. That is right.

Q. Stockholder of United Artists? A. That is right.

Q. Would you describe very briefly the nature of your duties while you were with Eagle Lion, what it meant to be in charge of publicity, as I understand it, of
863 these pictures, and promotion? A. If you lump the three terms, advertising and publicity and ex-

ploitation together, what that means primarily is merchandising of motion—in any media—pictures which passed through Eagle Lion as a distributing organization.

I would have three departments functioning under me, one advertising, one publicity and one exploitation, and I was the director and the supervisor of the methods that we used in publicizing, advertising and exploiting those pictures and promoting them in any way.

Q. I show you a document which has been marked in evidence here as Plaintiffs' Exhibit 11, being a list of some 196 pictures of Eagle Lion, that were in distribution in the years 1946 to 1950. I would ask you to look through that list quickly, if you would, and see if you recognize the pictures that are listed there. A. With the exception of a few at the very end, I recognize them all.

Q. You know those pictures and you were in charge of their promotion, as I understand it, from what you have said, and their advertising? A. Up to the time
864 I left in 1949, but even pictures which may have been put in distribution after the time I left, I may be familiar with because many campaigns are done three months, six months, sometimes even longer, before the actual placing into distribution.

Q. And you are familiar with those pictures that at least go up to that time of your departure? A. Oh, yes, and some beyond that.

Q. In your capacity as vice-president in charge of those activities were you also familiar with the product of other distributors, such as, for example, Paramount, Metro-Goldwyn-Mayer, United Artists, Universal, Columbia, and Allied or Monogram, Republic and so forth? A. Yes.

Mr. Raftery: And RKO.

Q. And RKO, excuse me. I slighted one of them.

Could you, Mr. Youngstein, with your knowledge of that product and the knowledge of the product that you were charged with promoting, could you tell us the relative box office appeal of the product of Eagle Lion as compared

to the product of the distributors that I have mentioned?

A. I would say, with the exception of M nogram,
865 that we would be at the very bottom rung of the ladder.

Q. And you worked on the promotion of this product as well as you could, isn't that correct? A. I had to appraise these pictures, yes, because it is a competitive situation. I had to.

Q. You were promoting these pictures not only in New York but across the country as a whole, is that correct? A. Yes, New York, across the country as a whole and, to some extent, in our worldwide distribution, wherever we did have distribution releasing setups outside of the United States.

Q. Are you in a position to appraise the relative box office appeal of these Eagle Lion pictures in the New York market as compared to the pictures, let us say, of Metro-Goldwyn-Mayer, Paramount, RKO, Warner, Universal, United Artists? A. At the time between 1946 and 1949?

Q. Correct. A. I would say that in my opinion, and this is a matter of opinion, no one can be very exact on this, but in my opinion they were much inferior to the companies you outlined.

Q. So far as box office appeal in the New York area. That is what my question is directed to. A.
866 Much inferior.

Q. Mr. Raftery has mentioned to me that I did not include Columbia in that question. Would your answer be the same if I had included Columbia Pictures in the group of seven that— A. I would say that at that time much inferior to Columbia also.

Q. I show you an exhibit that has been marked Defendants' Exhibit F, Defendant Loew's Exhibit F, being a list that includes some 18 Eagle Lion pictures that grossed nationally more than $500,000 and that showed in either the Loew's or the RKO theatres first neighborhood run, and I would ask that you go through that list, in the

lefthand column of that exhibit, and direct your attention to the titles that are underscored.

The Court: Then what do you ask?

Mr. Gillespie: He is in the process, your Honor.

The Witness: All right.

Q. Will you please note in the second column the playing position of those respective pictures? For example, T-Men, top, long-half; Out of the Blue, second, long-half—
867 that means second feature; and so on. A. Difficult for me to absorb this all at one time. If you do it one by one, I'll be very glad to do it.

The Court: You have asked him to look at the exhibit as you indicated. What are you going to ask him, so he will have that in mind while he is doing the looking?

Mr. Gillespie: Quite right.

Q. Would you tell us, Mr. Youngstein, from your knowledge of those pictures and the relative market of available pictures whether in your opinion those pictures received the playing time or the playing position that they were entitled to receive, having in mind the merits of those pictures?

Mr. Wright: Of course, I think, if I might point out at this time, there is not the slightest foundation laid for any competence on this witness' part to say where any picture belonged or did not belong in these circuits in New York or anywhere else. It was, apparently, not part of his job to negotiate film contracts. He was concerned wholly with and exploitation.

The Court: Here is a man who has had a long
868 experience, who was in Eagle Lion, and a lot of other companies, and he is being asked whether in his opinion from that experience they played in the right relative position. I think he is sufficiently qualified to give an opinion on it. You may cross-examine him on it.

Mr. Wright: We have no objection, of course, to his giving an opinion about the pictures as such. This is a

somewhat narrower opinion as to what particular position they should have had.

The Court: I would assume that a man who is in charge of publicity and promotion for a company is qualified to have some opinion as to whether the picture is being exploited as it should have been exploited. I will allow him to answer the question.

Do you want the question read?

Mr. Gillespie: If you would like, I could rephrase it.

The Court: I think we can have it read.

(Question read.)

A. I would say Yes, in view of what the competitive situation was at the time and pictures available from other companies.

869 Q. You have gone through these 18 pictures that are on Loew's Exhibit F? A. As to the ones on this first page. I didn't go through the—

Q. Would you please go through the ones on the second page. A. I have to cut it off at the point Destination Moon because I left just prior to the time that Destination Moon was put into distribution, and while I am thoroughly familiar with the picture, I didn't have any direct responsibility for the picture at the time.

Mr. Wright: Excuse me, but we don't seem to have the second page.

Mr. McGovern: You took it back, Mr. Gillespie.

A. (Continuing) My answer is Yes, that they received fair treatment and proper allocation.

Mr. Raftery: Just one question.

Cross-Examination

By Mr. Raftery:

Q. Whether independent exhibitors or circuits, whether in New York or out of New York, in the domestic field did you have the same sales resistance against Eagle Lion pictures during the period you were in charge of their

promotion and exploitation? A. Whether it was exactly the same or not, I cannot answer, but there was
870 tremendous resistance to Eagle Lion for many reasons.

By the Court:

Q. What were the reasons? A. Number one was the quality of the films themselves; number two, in my opinion, was that actually we were an amalgam of three companies trying to get together. One was then called PRC, Producers Releasing Corporation, which had one of the worst stenches in the history of this business as a producer and distributor of films. Some of its product was carried over.

Then you had the business of launching a company which was a new company in a highly competitive field under the name Eagle Lion, which was unknown in this country. There was such a company overseas. That brought with it not only Hollywood product but products from J. Arthur Rank, English product.

And there was, and has been, historically, and right to this day, a great resistance to the playing of English product because exhibitors who have tried it found that on any continuing basis this would not pay off at the box office.

So you were trying, not only to sell an English picture, you were trying to launch a new company which
871 was made up out of strange composite parts, an old PRC company, which was very bad, and Eagle Lion Company, which had no known continuous history of producing or distributing quality films.

We also had a brand new studio at the time, that is, had taken over a new studio, and people who had never been in charge of this particular type of operation, namely, in charge as an executive producer. Although the individual was a good producer, he had never been an executive producer in charge of an entire studio. All of this was manifested.

The same thing was true of the distribution organization, which was built around the core of the distribution organization which had serviced PRC and, as I say, PRC was the absolute bottom as far as quality of product and reputation was concerned.

Q. The producer you referred to was Bryan Foy, I presume? A. Yes.

Q. Bryan Foy for a number of years prior had made the so-called B pictures for Warners? A. He had made a great many B pictures for Warner's and for Fox. To the best of my knowledge he had never been an executive producer of a studio.

872 Q. And he had never produced high quality, high-priced pictures?

The Court: Isn't that a sort of leading question?

Mr. Raftery: I am cross-examining a hostile witness.

The Court: We will take that with a real grain of salt

Mr. Wright: I didn't catch—

Mr. Raftery: I withdraw the question.

Mr. Wright: I didn't catch the name of the fellow he was talking about.

The Witness: Bryan Foy, known as Briney Foy.

The Court: Any cross-examination?

Cross-Examination

By Mr. Wright:

Q. Mr. Youngstein, you said you started in this business working for some kind of Fox subsidiary. A. Well, let me make that very specific. It was an organization called the Howard Horn Organization, which was a public relations and publicity organization which handled the top Fox product. I was brought in as general manager and counsel for that company that handled Fox product like How Green Was My Valley, which was one of the

873 big pictures of its time, and at the time of the death of Sidney Kent, who was president of Twentieth Century-Fox and the advent of Spyros Skouras as

president, our company, the Howard Horn Organization, was taken over completely by Twentieth Century-Fox, and I joined Twentieth Century-Fox at that time. It was at least 15 years ago.

Q. When was it the company became a wholly-owned subsidiary of Fox, the date? A. It wasn't a wholly-owned subsidiary in any legal term. It was a company working primarily, almost exclusively, on Twentieth Century-Fox products, and most of its income was derived from Twentieth Century-Fox, and practically was controlled by Twentieth Century-Fox.

Q. Did Fox ever take it over? A. Yes, it did take it over.

Q. When did it become a wholly-owned subsidiary of Fox? A. It was bought out and I think washed out. It wasn't taken over as such. It was probably in 1941, but I don't know whether it was the end of 1941 or early in 1942. Sometime around that time.

Q. As I understand your testimony then, you were working for Fox from 1941 up, is that right? A.
874 No. I was on the payroll of this organization.

Q. After Fox took it over you worked for Fox. Any doubt about it? A. (No answer.)

Q. How long did you continue with Fox? A. I forget the exact period. It was, oh, I think—I am trying to exclude the years during the war when I was at the Treasury. I would say it was around four to five years total.

Q. That was about 1945 that you left Fox, is that right? A. That is about it.

Q. Can you tell us why you left there, what the occasion for leaving was? A. I had returned from the Treasury Department and there had been a change in the department due to the resignation of the man who was my immediate superior, Mr. Howard Horn, and I didn't want to remain on, and I joined him in another venture.

Q. What was this other venture with this public relations— A. That is right.

Q. (Continuing) —outfit? And that is what you
875 had when you decided to go with Eagle Lion, is that right? A. Yes.

Q. That was here in New York? A. Right here in New York, 1 East 57th Street.

Q. Then what was it that persuaded you to go to the—this was in 1946 you went with Eagle Lion? A. Yes.

Q. What was it that persuaded you to go with Eagle Lion at that time? A. I thought it was a great challenge and I thought it would be a move forward in my career, and I, primarily, I believe it was because I liked the people who were associated with the management at that time with Eagle Lion, namely, Mr. Arthur Krim, Mr. Robert Benjamin, and Mr. Al Schwalberg.

Q. There wasn't any doubt at that time, at least you thought the opportunity to get paid for publicizing Eagle Lion pictures was better than anything you were then enjoying? A. That is not true. I was thinking about it in terms of potential. There was no picture produced at the time I made my decision, not one single picture was ready to be looked at at that time. I frequently have re-
876 gretted that decision.

Q. Now you made some rather sweeping statements about the quality of these Eagle Lion pictures—

Mr. Gillespie: Your Honor, is this a question?

Q. (Continuing) —and particularly in New York—

The Court: I will allow it. Coming to the question.

Mr. Wright: I want—

The Court: He is just winding up. The question will come.

Mr. Wright: Yes.

Q. I want to ask you whether your opinion, as I understand it, just applied to Eagle Lion product as a whole, say, that no matter what the source of it was, or what particular kind of picture it was, they had no appeal in New York City; is that your testimony? A. That is

absolutely not so. I have answered it in connection with the specific pictures that were pointed out on this list.

Q. Maybe I misunderstood you. I thought— A. That is quite possible.

877 Q. I thought you went further.

The Court: Let us have a question and not have an argument with the witness.

Q. It is a fact, isn't it, that Eagle Lion actually distributed and you publicized pictures which had a greater appeal in New York City than anywhere else in the country? Is there any doubt about that? A. That happens once in a while, very rare instances. Red Shoes, I would say. And I, offhand, cannot think of another one without going through this whole list of 196 pictures.

Q. How about the foreign pictures, foreign-made pictures, that Eagle Lion had? A. If you want to include those as having special appeal in New York, I would say a number of those had, but I would have to examine these closely and—say, maybe a picture like Quartette comes to mind, that I handled during that period. But those pictures were pictures which inevitably found themselves in a special category and never went out in general release because they were confined practically exclusively to what has been called the art house circuit.

Q. And if you really wanted to say anything, say
878 of value, about the box office quality of any of those pictures, you not only have to examine the titles, but you would have to look at what they grossed, wouldn't you? A. I know pretty much what they had grossed and whether they were—I know most of the costs, most of the information about the pictures.

Q. But it is a fact that if anybody wants to know the box office value of a particular picture, there are better sources available than your opinion? A. There are better—

The Court: That is not a question. Let us ask questions to get facts.

Q. It is a fact, is it, that all these pictures that you have been talking about had actual box office— A. All of what pictures?

Q. (Continuing) —performance? A. All of what pictures I am talking about? You name which ones.

Q. All those pictures in the Eagle Lion list.

The Court: We know that. It has been shown they had box office return, varying all the way from a few dollars up to many thousands of dollars.

879 Q. When you came over here to testify did you make any effort, in preparation of this expression of opinion here, to look at what the pictures that you were going to talk about had actually—how they performed at the box office? A. Yes, certainly did.

Q. You are telling us—are you telling us anything different from what appears on the actual box office records themselves?

The Court: Objection sustained. He gave his opinion as to the comparative box office appeal of those pictures as compared to other pictures of other companies. That is what you should cross-examine him on. He is not, as I understand it, disputing the figures as to what Eagle Lion got at the box office.

880 Mr. Wright: I suggest there isn't any dispute as to what any picture got at the box office, there couldn't be. What I want to find out is he here to somehow impeach or contradict the opinion about pictures that has been registered by these figures we have in evidence, as to what they actually grossed, that is all. That, I should suppose, is the primary evidence of the box office appeal of individual pictures.

The Court: All right. Any more questions?

Mr. Wright: I don't have anything more.

The Court: Anything more?

Mr. Wright: May we have a recess?

The Court: You just discuss it among yourselves before we have a recess.

By Mr. Wright:

Q. You are, you say, not only vice-president but a co-owner of United Artists? A. That's right.

Q. Who is your best customer here in New York City, who pays you the most total film rental?

The Court: In this period or—

Mr. Wright: Right now.

A. Loew's, I believe. I am not certain.

881 Mr. Gillespie: I ask that the question be read.

(Question read.)

Q. The success or failure of that company of yours depends to a large extent, doesn't it, on the rentals to Loew's circuit? A. It does not.

The Court: Finish the question. Don't interrupt. Read the question.

(Question read.)

The Witness: I thought the question—

Mr. Raftery: The objection didn't get in.

Mr. Wright: That is all.

The Court: Is that all?

Let me ask the witness a question I was thinking somebody else would.

By the Court:

Q. You say these Eagle Lion pictures didn't have as great an appeal as the pictures of the other companies, the other major companies. Was that true generally throughout the country? A. Yes, it was true generally throughout the country but in different degrees. You would have to take pictures almost one by one and analyze

882 them on the basis of their particular appeal. It is very frequent that a picture can do well outside New York that will have no great interest in New York. The reverse of that is also true. That is true not only of Eagle Lion but any other company in the business. There

are pictures called pictures that are made for the sticks. I don't say that derogatorily, but there are pictures like Ma and Pa Kettle which would show a tremendous disproportion in what they would earn outside of New York as against what they would earn in New York.

883 By the Court:

Q. Taking the Eagle Lion list of pictures generally while you were there, was it your impression that they would do better or worse proportionately in New York? A. Overall, in my opinion they would do worse in New York because they were not to any large extent critics' pictures. New York is one of the few places where critics' reactions help box office and help determine the entire selling of the picture from first run in the circuit, in the second, third and fourth run down the line until you have blanketed the metropolitan territory. That is not only New York City alone. That is the entire metropolitan territory. The newspapers have that importance.

The very nature of this product at that time, with the exception of a picture like a Red Shoes or perhaps a Quartet, one or two others, if I took the time out to search through, but overall these were pictures that receive terrible reviews in New York, they receive very bad trade paper reviews. They are pictures which I would say would do much better outside of New York than in New York.

The Court: Any further questions?

884 Mr. Gillespie: No further questions.

The Court: You are excused.

We will take a five-minute recess.

Mr. Wright: I wonder if he could stay here, because we might have a couple of questions.

The Court: All right.

(A short recess.)

Mr. Wright: We have a couple of questions.

By Mr. Wright:

Q. Mr. Youngstein, during the time that you were with Eagle Lion, who was the president of the production company that was making these pictures for Eagle Lion? A. I don't remember technically whether it was Arthur Krim or Brynie Foy.

Q. Arthur Krim you knew was president of the production company? A. I knew Arthur Krim was president of the Eagle Lion company. Just what the breakdowns were there below that, I don't remember. I probably knew at that time, but I don't remember now whether it would be Arthur Krim. There was a separation, as a matter of fact, of the company, but I don't remember at this time.

885 Q. Whatever the separation was, the corporate separation, Mr. Arthur Krim was the president of the top company in production as far as those Eagle Lion Films were concerned; is that right? A. He was the president of the company for which I worked, yes.

Q. And that is the same Mr. Arthur Krim who is now president of United Artists and a co-owner of the company with you? A. Exactly.

Mr. Wright: That is all.

The Court: Any further questions of this witness?

Mr. Gillespie: No further questions.

(Witness excused)

The Court: Next witness.

Mr. Gillespie: Mr. Downing.

Russell V. Downing

called as a witness by the defendant Loew's being first duly sworn, testified as follows:

Direct Examination by Mr. Gillespie:

Q. Mr. Downing, where do you live A. 424 East 52nd Street, New York City.

Q. What is your present occupation? A. Presi-
886 dent and managing director of Radio City Music Hall Corporation.

Q. How long have you been associated with the Radio City Music Hall? A. Nearly 23 years.

Q. What was the nature of your employment when you first became associated with the Radio City Music Hall? A. Treasurer.

Q. And will you describe briefly to us the various steps in your progression through to your present position. A. I was treasurer until 1942, when I became vice-president and treasurer; in 1948, executive vice-president, and in 1952, president and managing director.

Q. Could you tell us the scope of your duties during that period of time as it related to arranging the entertainment programs or providing for the entertainment programs at the Radio City Music Hall? A. I have always been very closely associated with all of the entertainment features, including the films from the time that I joined the Music Hall organization.

From 1942 until 1948, I was second in command,
887 and from 1948 on I have carried the entire final responsibility.

Q. For determining the programs that would be presented? A. Final approval.

Q. Final approval of the programs that would be presented at the Music Hall? A. That's correct.

Q. Could you tell us very briefly the procedure followed by the Radio City Music Hall in selecting motion pictures for its program at the Music Hall. A. Well, we keep very closely in touch with the production that is going on in all of the film studios, and most of the time we are called by the sales managers of the various film companies, asking us if we will attend a preview of a picture they have which they think will be suitable for playing at the Music Hall or if they can send over a print to our preview room and if we would look at it.

There are times when we do not hear from a sales manager, and if we are particularly interested in a picture of any company, then we will contact its sales manager and ask about the availability of the picture.

888 Q. When you screen these pictures in the Radio City Music Hall, do you have a staff that attends, or how is it done, or do you do it yourself? A. We have a staff of seven. Well, that constitutes what we call the previewing committee. If we are interested in a picture, then we will show it to our entire case in our own preview room, which seats about 90 people, and we have a printed form in which we ask their opinion of the picture and its suitability for a Music Hall audience.

Q. Has it been your previous over the period of 1942 to the present time that distributors have sought the opportunity to exhibit a picture at the Radio City Music Hall? A. Yes, it has.

Q. Could you tell us during the period of 1946 to 1950 whether you exhibited one or more of the features of any of the distributors whose names I shall now give you: Paramount? A. May I refer to my notes?

Q. You certainly may. A. Is this 1946?

Q. From 1946 through 1950.

Mr. Wright: If he has a schedule of what

889 they played, maybe you can just put that in.

Mr. Gillespie: I don't think he has.

The Witness: I just made some penciled notes here.

The Court: You can use it to refresh your recollection. What was the question—Paramount?

A. 1946 did you ask me?

Q. 1946 to 1950, whether you played one or more pictures of Paramount Pictures? A. We did. I can tell you exactly how many in each year, if you wish.

Q. How many in 1946? A. One. None in 1947; one in 1948; two in 1949, and one in 1950.

Q. Loew's Metro-Goldwyn-Mayer? A. Paramount you said.

Q. I am now going to the next one, Loew's Metro-Goldwyn-Mayer. A. Three in 1946; five in 1947; six in 1948; six in 1949, and five in 1950.

Q. Columbia Pictures? A. Two in 1946; one in 1947; none in 1948, none in 1949, and two in 1950.

890 Q. RKO? A. One in 1946, one in 1947; two in 1948; none in 1949, and one in 1950.

Q. Twentieth Century-Fox? A. One in 1946, two in 1947; none in 1948; one in 1949; none in 1950.

Q. Warner Bros.? A. One—none in 1946; none in 1947 or 1948, two in 1949; four in 1950.

Q. Universal? A. None in 1946; two in 1947; two in 1948; one in 1949; none in 1950.

Q. And United Artists? A. None in 1946; none in 1947, 1948 or 1949; one in 1950.

Q. Is it a fact that the screen of the Radio City Music Hall is open to anyone, to any distributor who comes forth with a picture that you find of sufficient merit to show there? A. Very definitely.

Q. Is the Radio City Music Hall associated in any way with any of those distributors that I have just mentioned to you in a business way? A. No, sir. It is entirely independent.

891 Q. During this period of 1942 on down, when you were in the process of screening and selecting a picture, could you tell us just exactly how your group that does the screening and yourself comes to the conclusion as to whether or not you will show a picture. A. Well, a picture is compared with the pictures of all the other companies that have one available for release at that particular time, and we endeavor in our better judgment to pick the one we think is the best and will do the most business.

Q. Did you, during this period of 1946 to 1950, have a knowledge of the available product of all of these eight distributors that I have just mentioned? A. Yes, I did.

Q. And did you also have knowledge of the product of a distributor called Eagle Lion? A. I did.

Q. Did you, during that period of 1946 to 1950, at any time screen any of the pictures of Eagle Lion? A. Yes. To my recollection we screened, at the request of the then general sales manager—I believe it was Mr. William Heineman—at his request we screened a picture called Tulsa. I went to a screening at his request of
892 Destination Moon. In our own screening room we looked at The Winslow Boy and Quartet.

Q. Is it a fact that you screened every picture that the Eagle Lion people requested you to screen? A. I would screen each and every one that was requested as I would from any company.

Q. And they requested you to screen those four pictures? A. That's correct.

Q. Did you play any of those pictures at the Radio City Music Hall? A. No, we did not.

Q. Did you at any time in the period of 1946 to 1950, play any Eagle Lion picture at the Radio City Music Hall? A. We did not.

Q. Now would you tell me in connection with Tulsa what were the considerations that led you not to license that picture for exhibition in the Music Hall. A. As I recall it, in the period immediately following our Easter show the available product from all companies was very, very slim, and Tulsa was sent to us by Mr. Heineman after he talked with me.

As I recall it, he said, "I know that there
893 isn't too much product around and I have a picture that I think you might be interested in, even though it is an outdoor type, bordering on the western, and I know that you don't play too many of those type of pictures, but I would like you to look at it."

And we did look at it, and, fortunately, Metro-Goldwyn-Mayer called me the same day or the day afterwards and

said that they were going to have The Stratton Story available.

Q. Who played in The Stratton Story? A. Oh, that was Jimmy Stewart and June Allyson. So I asked how soon they could have a print in from Hollywood and they said they would fly it in in a day or two, and I looked at it and, of course, there was no comparison in our judgment of the suitability of The Stratton Story as against Tulsa.

Q. When you say "the suitability," that is for the New York market? A. That's correct.

Q. Mr. Downing, are you in a position to express any opinion based upon your knowledge of the pictures of the eight distributors and on the work done by your staff at the Radio City Music Hall as to the relative merit of the Eagle Lion product as against that of the
894 eight distributors whom I have mentioned for the New York market as compared with the market outside of the New York area? A. I think so. The product of the eight distributors you mentioned was much more diversified, in many instances, larger-budget pictures, as we call them in the trade, and more of the type that the metropolitan audience which you have in New York will patronize.

We have a peculiar condition in New York City. A great many pictures that will do well in the wide open spaces—and there is a large area of that type in the United States, as you know—pictures that will do well in that area will just not do well in the New York market because people are not familiar with that way of life, and so we try to avoid in the Music Hall—and I feel the Music Hall in a sense is no different from any other theatres in the area—we try to avoid playing pictures that people don't want. It is our job to find entertainment they want and we want pictures they will patronize.

By the Court:

Q. Have you ever counted the number of New Yorkers

who are in the Music Hall on an evening compared
895 with people from outside the city? A. No, we have never made an exact count, your Honor, but we know that in three months in the summer it is balanced in favor of out-of-towners, but in the season, New Yorkers predominate, although we get a large percentage of out-of-towners that may be in town.

The Court: I always assumed the Music Hall was full of out-of-towners.

By Mr. Gillespie:

Q. You have other attractions than films at the Radio City Music Hall? A. That is what draws the out-of-towners is our stage show, because they don't have it where they come from.

Q. You are opening a new one today, is that true, Mr. Downing? A. We are. Perhaps I should have brought the Rockettes with me.

The Court: It would be a lot more interesting.

The Witness: I agree, after twenty-three years.

Q. I take it, Mr. Downing, from your answer to my previous question that you understood the Eagle
896 Lion product to be more generally of the outdoor type as compared to the product of the eight distributors that I mentioned. A. That's correct.

Q. One other question. Is the Radio City Music Hall connected or associated in any way with any circuit of theatres or chain of theatres? A. Absolutely not.

Mr. Gillespie: You may examine.

Mr. Wright: No questions.

Mr. Gillespie: Thank you very much, Mr. Downing.

(Witness excused)

The Court: Next witness.

Mr. Gillespie: Your Honor, I would like to check over our record here a little bit. I think that perhaps we have called all the witnesses that we are going to call except to

identify one or two documents, if it is necessary, and I think a brief conference with Mr. McGovern and Mr. Wright might be able to clear that up.

The Court: Let me ask you this. Is the plaintiff going to call any more witnesses?

Take this off the record.

897 (Discussion off the record.)

Mr. Raftery: RKO rests.

Mr. Gillespie: Your Honor, just subject to getting some of these documents arranged and agreed with Mr. McGovern, I think we will be prepared to rest.

The Court: Do you want to take a five-minute recess now so we can clear that this afternoon?

Mr. Gillespie: Will they have their witness so we can get all through?

The Court: I understand the witness will be here tomorrow.

Mr. Gillespie: Can't it go until tomorrow, your Honor? I have a list of theatres here in the metropolitan area and one or two statistical things.

Mr. McGovern: Maybe there is no need for your Honor to sit around.

Mr. Gillespie: That is what I suggest.

The Court: Off the record.

(Discussion off the record.)

(Adjourned to Friday, February 17, 1956, at 10.30 o'clock a.m.)

* * * * * * * * * * *

898 Mr. Gillespie: Your Honor, last evening I stated that subject to checking a few figures, and so forth, that the defendant Loew's was prepared to rest. I have furnished a few figures to Mr. McGovern over the night and I understand that they have no objection to these.

I will offer them separately, if that is agreeable, and then we will be completed.

I have, first, a numerical list and list of addresses of all theatres in the so-called metropolitan area of New York City other than the theatres of Loew's and RKO.

I understand that has been received and checked by the other side.

Is there any objection to that?

Mr. Wright: We didn't check it. We are agree-
899 able to its going in with the understanding that it represents no substantial change from the situation as it was in 1945.

The Court: Received in evidence.

(Marked Loew's Exhibit G in evidence.)

Mr. Raftery: That doesn't include any RKO's?

Mr. Gillespie: It does not.

Mr. Raftery: Will you so state on the record.

Mr. Gillespie: I stated that it is other than Loew's or RKO's.

I have a summary list which summarizes the exhibit which has just been offered in respect of circuits and seating capacities and so forth, which was also made available to the plaintiff last night. I would like to offer those two summary sheets.

That is correct?

Mr. Wright: There are two of them?

Mr. Gillespie: There are two of them. One is of the seating capacity and the other is of total of theatres.

You may mark those together.

This speaks as of 1948, your Honor.

I assume there is no objection?

Mr. Wright: No objection.

900 The Court: Received in evidence.

(Marked Defendant Loew's Exhibit H in evidence.)

The Court: In Defendants' Exhibit H you have the number and the percent. What is that, the number of theatres or the seats?

Mr. Gillespie: The second page is the number of seats, your Honor.

The Court: All right.

Mr. Gillespie: Your Honor, yesterday afternoon I also made available to the plaintiffs' attorneys a schedule showing the year-by-year variations of the ratios of metropolitan sub-run to the national less metropolitan sub-run of the eight distributors on their median pictures, in other words, taking it year for year from 1946 to 1950, breaking down those figures and setting forth the ratios for each of the eight distributors, and then a supplemental sheet which showed the respective orders in rank of those eight distributors.

I understand that there is no objection to those two exhibits, so I offer those in evidence.

The Court: They will be received in evidence without objection.

(Marked Defendant Loew's Exhibit I.)

901 Mr. Gillespie: The first page, your Honor, are the respective ratios and the second page is the order over the four years.

The Court: All right.

Mr. Gillespie: Last evening, your Honor, I made available to plaintiffs' attorneys a list of the respective ratios on each of the 96 pictures, the median pictures of the eight distributors figured as to individual pictures.

The Court: Ratio between what?

Mr. Gillespie: Ratio between the metropolitan sub-run to the national minus the metropolitan sub-run.

The Court: I understand.

Mr. Gillespie: It is the same as the 6.4 ratio or the .089 ratio, but it is broken down as to individual pictures, and I understand that there is no objection.

Mr. Wright: That is right.

The Court: Received in evidence without objection.

(Marked Defendant Loew's Exhibit J.)

The Court: All right.

Mr. Gillespie: Your Honor, we marked for identi-
902 fication in the course of the plaintiffs' case certain work papers used by Mr. Gross in the preparation of his figures. It was marked Defendant's Exhibit A, I believe, being the summaries as to each of the eight distributors, and at this time I would like to mark those summaries in evidence together with certain additional summary sheets which were attached to that. I understand there is no objection, and I would ask it all be included as A in evidence, if that is agreeable.

The Court: All right.

(Defendant Loew's Exhibit A for identification received in evidence.)

Mr. Gillespie: Your Honor, two days ago the plaintiffs came forward with an exhibit, I think—two exhibits which were marked in evidence at the close of their case, Plaintiffs' Exhibits 27 and 28, in which they made comparison of certain pictures of theirs and the eight distributors. We have not as yet prepared our counter to that exhibit but we will be in a position to do so from the material in evidence subject to one or two film rentals paid by the Loew's New York metropolitan sub-run theatres to Eagle Lion if the plaintiff will be willing to stipulate those
903 amounts, and I would like to read the amounts and just ask them if they would stipulate that those are correct.

The Court: Have you shown them to them?

Mr. Gillespie: I got them this morning.

The Court: Show them to them silently and see if they will concede.

Mr. Gillespie: That would save a little time.

(Counsel confer.)

Mr. Gillespie: I understand that subject to correction there will be no objection to this, your Honor.

The Court: All right, it will be received in evidence. If there are any corrections to be made the Court had better be advised of them within a week, and counsel advised, so the record will be complete.

Mr. Wright: The exhibit says Loew and New York metropolitan—oh, I see.

Mr. Gillespie: Subsequent run.

Mr. Wright: Those are just Loew?

Mr. Gillespie: That is just the Loew theatres. Then there are three rentals in respect of RKO metropolitan subsequent-run theatres for certain Eagle Lion pictures which we would like a similar stipulation on.

904 (A pause.)

Mr. Gillespie: I offer those in evidence subject to correction, your Honor.

The Court: Received in evidence without objection.

(Marked Loew's Exhibits K and L.)

Mr. Gillespie: Will the other side, after you have checked that, agree that we can substitute—that is a rather sloppy piece of paper.

Mr. Wright: Surely.

Mr. Gillespie: We will substitute a better piece.

Your Honor, there are just two other things before defendant Loew's rest. Yesterday I overlooked asking Mr. Vogel on examination whether Loew's screened all of the pictures of Eagle Lion's that they were asked to screen, and I understand the fact is that they did screen all that they were asked to screen, and I understand that the plaintiffs' counsel will stipulate that Mr. Vogel would so answer.

The Court: Is that correct?

Mr. McGovern: That is correct.

Mr. Gillespie: The remaining thing, your Honor,
905 has to do with the answers to interrogatories of the defendant theatre companies. I am not quite

clear in my mind where those answers stand, as to whether they are in evidence or not in evidence. When they were first brought forward to your Honor there were objections made on our side, and I understood your Honor took the distributors' answer to interrogatories but not the answers of theatres companies.

The Court: By that you mean the defendants?

Mr. Gillespie: That is correct. That was my understanding, and I just would like to find out from your Honor or from the plaintiffs their understanding of the matter.

The Court: My understanding is that the answers of the defendants are in the case as answers which are admissions in the case. Therefore, they didn't have to be received in evidence.

Mr. Gillespie: Correct. The full answers are in?

The Court: The full answers are in. Is that right? Is that your understanding?

Mr. Wright: I think they should be marked here then because this Exhibit 25 is still marked for identification.

906 The Court: Then let us mark them in evidence.

Mr. Wright: That is, the RKO Theatre interrogatories, and the Loew answer relating to the theatre circuit, of what is marked as still 13-A for identification, that should be marked in evidence.

The Court: That is the Loew's?

Mr. Wright: That is Loew's, yes.

The Court: We will receive them in evidence, if there isn't any objection.

Mr. Gillespie: Your Honor, I am sure that we will object, of course, to the RKO, and I am sure RKO still objects to ours, but subject to those, we just want to know what the fact was.

The Court: I realize that. I will receive them.

Mr. Gillespie: I understood your Honor had previously received them but the record didn't show that.

The Court: I wasn't sure whether I received them or

whether I said they were part of the record, being answers, but if they were marked for identification, it won't do any harm to receive them in evidence.

907 (Plaintiffs' Exhibits 13-A and 25 for identification received in evidence.)

Mr. Gillespie: With that, your Honor, the defendant Loew rests.

The Court: Everybody rests?

Mr. Wright: There is one question I have. We received from the defendants last night these theatre lists of the RKO and the Loew neighborhood theatres, that I thought were going in, and I assume the data is reflected in one of the summary sheets, and we should, I think, have these in evidence to make the summary intelligible. As I understand it, it compares a number of other theatres with RKO and the Loew theatres. I would like to have these marked along with the others. As I understand, last night it was agreed.

Mr. Gillespie: Your Honor, so far as Loew sheets, we have no objection.

The Court: No objection to receiving these?

Mr. Raftery: I have never seen them. So may I look at RKO?

I will consent to the going in subject to the right to correct, if any error should appear.

908 The Court: Received in evidence.

Mr. Wright: Also, our list as of—

Mr. Raftery: Let me have the copy of the RKO, will you?

Mr. Wright: I ask to have these marked together as the next plaintiffs' number, and while those state the situation as of 1948, I understand that it is also agreeable to stipulate as to those that represent no change in the theatre ownership, no substantial change, from the stipulation in 1945.

The Court: Is that correct? Is that stipulated?

Mr. Raftery: I didn't get it. I was trying to check this list.

Mr. Wright: I was just saying, while those on their face purport to be 1948 lists, as I understand it from my conversation with Mr. Gillespie last night, there is no contention that that shows any substantial change from the theatre situation in 1945.

Mr. Raftery: I would say that is true as to RKO, and we put in evidence, through Mr. Schwartz, each and every theatre. For example, the first neighborhood theatre listed on here is the Albee, Brooklyn.

909 The Court: We will take it.

Mr. Raftery: And for the record, Mr. Schwartz testified the Albee is a first-run theatre, Brooklyn, and not a neighborhood theatre. With that one correction, I will withdraw any objection.

The Court: All right, we will receive them in evidence.

(Marked Plaintiffs' Exhibit 31.)

The Court: Anything more?

Mr. Wright: Yes, we have one final witness.

Mr. Neil Agnew, will you take the stand.

Neil Agnew

called as a witness in behalf of plaintiffs, in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wright:

Q. Where do you live, Mr. Agnew? A. Larchmont, New York.

Q. What is your occupation? A. I am connected with the expansion of the Fred Astaire Studio operations in the United States.

Q. Were you formerly in the motion picture business? A. I was.

Q. Can you tell us just what the positions you
910 held were with Paramount Pictures and when you held them? A. Well, I started with Paramount Pictures in 1920 and I held various positions up to 1942. The last of those positions was sales manager, domestic sales manager.

Q. That is, you had charge of sales for the entire United States? A. That is right.

Q. That was during what period? A. About four years, prior to 1942.

Q. Then when did you leave Paramount? A. I think it was in April in that year.

Q. Then what did you do? A. I took over the supervision of sales for the Selznick Company.

Q. That Selznick Company was called what? A. Well, in the beginning he had- -he distributed his pictures, that is, David Selznick, the individual, owned the company, distributed his pictures through the United Artists Corporation. After a period of, I think, about a year, he formed his own company and I was the head of the company which was called SRO, which was a distribution company for his own pictures.

911 Q. You were the head of the company for how long? A. About four years.

Q. Can you give us roughly that period? A. Yes, from 1943— '42 or '42, I am not certain— to 1948.

Q. Until about 1948? A. Through 1948 into the spring of 1949.

May I make a correction, please?

Q. Surely. A. I finished with the Selznick organization in October, 1948.

Q. And then were you connected with the sale of motion pictures in any way? A. Yes, I had a little distribution company of my own in partnership with another man.

Q. What was that company called? A. Motion Picture Sales, and we were engaged in distributing in the United States features, shorts and foreign and American-made pictures.

Q. How long did you continue with that company in active distribution? A. Three years.

Q. During then the entire period from 1942 through 1950 just tell us what, if any, connection you had with
911a the sale of pictures to the circuits here in New York?

A. Well, I contacted both of the circuits and particularly the Loew circuit, with whom the Paramount Company had most of its dealings during my office as--during my term over there, and afterwards later with both circuits equally, probably. In other words, we had dealings from time to time with both circuits.

912 Q. And you became familiar in the course of these positions you have described with the distribution of pictures not only in this area but nationwide? A. That's right.

Q. Did you examine the list of Eagle Lion product there that is contained on this schedule that has been marked in evidence as Plaintiffs' Exhibit 11? A. I have looked at it.

Q. Are you generally familiar with that Eagle Lion product released during that period 1946 through 1950? A. Generally, yes.

Q. Do you have any opinion as to whether that product that you see there would be expected to perform at the box office as well outside the New York metropolitan area as in it? A. It is a difficult question. I have no opinion as to the ratio of difference.

Q. There are no ratios on there. That data I think you have in front of you just has the titles of the pictures and the performance in the New York exchange,
913 New York first run, New York metropolitan area and the Chicago exchange and the Chicago first run.
A. And the names of the theatres first run New York.

Q. The names of the first-run theatres and the first-run rentals. A. Yes.

The Court: What is the question, Mr. Wright? Restate it.

Q. What I am asking you, Mr. Agnew, is whether you have any opinion as to whether those pictures on the list would be expected to do about as well at the box office outside New York as in metropolitan New York. A. There is a great difference, of course, in the pictures themselves.

Mr. Raftery: That calls for a yes or no, as I understand it, an opinion.

The Court: Opinions do not have to be yes; they can be "Yes, but" or "No, but." The witness says it is a difficult one. I do not know whether he has any opinion. Do you have any opinion on it at all?

The Witness: I don't have any opinion on it
914 without considerably more analysis and study than I have had a chance to make.

Q. On the basis of what you have seen there can you tell me whether that kind of product across-the-board throughout the period is the kind of product that you, as an expert distribution, would expect to produce as much film rental or do as well at the box office outside the New York area as in it?

Mr. Raftery: I object.

The Court: The witness has said he hasn't got any opinion on it on the basis of that data alone.

The Witness: I could express an opinion with respect to certain pictures, your Honor, but this is a long list of pictures and they vary very radically at the box office.

The Court: That is a fair, frank answer.

Q. During the time that you were selling pictures in this area, if you were given a choice as a distributor between the Loew's circuit as an outlet or the RKO circuit, which would your preference be? A. Generally our choice would have been the Loew's circuit.

Q. Why is that? A. A greater potential, we
915 thought at least, in the production of film rental.

Q. And why does the Loew's circuit have a greater potential than the RKO circuit?

Mr. Gillespie: Your Honor, I object now.

The Court: The witness can give his opinion as to why he did. He is an expert in the field.

Why would you say it did?

The Witness: Well, experienced proved to us that such was the case. We were guided by that.

Q. Do you know why it was that your experience was that you got more out of the Loew's circuit than the RKO circuit? A. Well, they had a larger circuit. I presume we are speaking of metropolitan New York.

Q. Yes, we are. Could you, during that time, get satisfactory playoff or exploitation of pictures in this metropolitan area without playing either the RKO or the Loew's circuits?

The Court: Let us get that down to particular years and particular types of companies and films. That is a rather general question, Mr. Wright.

See if we can't pinpoint it a little bit.

Q. Let us take the situation in 1945.

The Court: You are asking the witness whether
916 an independent distributor who did not get his picture on either the Loew's or RKO circuit could get adequate distribution of his film in greater New York; is that right?

Mr. Wright: Yes.

The Court: All right, the witness can answer.

Mr. Gillespie: Your Honor, it seems to me that that is not pinpointing it enough. We have 1945 now. The specific films, it seems to me—

The Court: You can cross-examine on that. The witness can answer that question.

A. Generally, I would have to say that there is and was a great advantage then in playing with either one of the circuits as opposed to not playing them.

Q. And did that condition continue throughout the period 1946 through 1950? A. As I recall, it did.

Q. Can you tell us why it was that you could not get satisfactory distribution in the metropolitan area without a playoff in one of the two circuits?

Mr. Raftery: That is objected to.

The Court: I do not know what you mean. He
917 did not say "satisfactory distribution." You are assuming something he did not say. As I understand, the witness says you would get a better distribution if you got one of the circuits, which I think obviously is true. There cannot be much dispute about that, I should think.

Q. Did you, Mr. Agnew, or could you, during that period, get a distribution in the metropolitan area here which you would regard as adequate to give the distributor the full potential of what was available in the area without a playoff in either the Loew or RKO circuits?

The Court: Mr. Wright, what a person may think is adequate for his product is a matter of opinion. I suppose you have to link that to particular motion pictures, particular types of motion pictures.

I never saw anyone who was selling anything yet who thought he was getting a fair sale of it. Therefore, I think you just cannot ask this witness a general question like that.

Q. Let us go a little further. As to a product which does well in terms of national gross, that kind of picture. A. Mr. Wright, I have, as far as I can recall now, never tried—I never tried to make an attempt to sell such
918 a picture away from either one of the two circuits. So I really and honestly can't give you an opinion as to what the result might have been.

Q. Just tell us why it was that you never attempted to negotiate with any other circuit than those two. I take it, what you are talking about is the first neighborhood ran in the metropolitan area. A. Generally, because of the reason that they had the dominating theatres in the area, the desirable theatres in which to play your pictures with respect to income, return.

Q. You were familiar generally, were you, with the other metropolitan areas in the United States, other large cities? A. Yes, generally.

Q. Was there any other city during this period 1945 through 1950 where there was a comparable concentration of theatres affiliated with one or more of the major distributors? A. Well, there are several such areas, yes.

Q. Could you name one? A. Los Angeles would be one; Chicago would be another.

919 Q. Any others? A. Detroit. Not entirely the same degree in each instance, but the condition you describe did exist in those cities.

Q. I am directing your attention to the number of theatres. Were there as many affiliated theatres, let us say in Detroit, as in the New York metropolitan area?

The Court: In proportion to all the theatres or just in total, Mr. Wright; which?

Mr. Wright: I have asked him both ways.

A. Neither way.

Q. There was not— A. Not in Detriont.

Q. Not proportionately or in total; is that right? A. That's right.

Q. How about in Chicago? A. No.

Q. And what would your answer be as to Los Angeles? A. In number, no.

Q. Do you think proportionately it would be about the same? A. I was thinking more in terms of the im-

920 portance of the theatres, the locations.

Q. In terms of the film rentals; is that right? A. That's right.

Q. About as much a proportion would come out of the theatres affiliated with Fox in Los Angeles, is that what you were thinking of, as would come out of the RKO or Loew's circuits? A. Either one. I should say that would be comparable somewhere in the middle between the two.

Mr. Wright: You may cross-examine.

Mr. Raftery: Just one or two questions on time.

Cross-Examination

By Mr. Raftery:

Q. You joined Vanguard Films, a Selznick company, in 1942? A. I believe that's right.

Q. And you went on the board of United Artists Corporation as a so-called Selznick director; is that correct? A. Yes.

Q. And you stayed on the Board until 1947, when Selznick sold his interest in United Artists? A. That's true.

Q. So from 1942 to 1947 Vanguard was distributing its pictures through United Artists? A. Until the formation of SRO.

Q. And SRO was formed in 1947? A. You have the dates. I don't have them with me.

Q. And these pictures from 1942 to 1947 were in the first instance sold by Sears or his staff to the various circuits or various theatres? A. Through United Artists.

Q. And you, as Selznick's man, could say, "I approve" or "I disapprove"; right? A. Right.

Q. And they were always top, big pictures? A. We always thought so.

Q. I know. And you always got the most for your pictures; right? A. I am not certain yet, but I hope so.

Q. Do you remember a picture called Spellbound? A. I do.

Q. And that picture opened in New York the day the trial of United States v. Paramount started in October 1945, right at the Astor Theatre? A. The date is not in my mind, Mr. Raftery.

Q. And all your pictures that you handled during that period and even during SRO, Mr. Selznick still made great, big, important pictures, generally got a deal in the best theatres in the best areas? A. Yes, I think that's right.

Q. So your experience practically down to 1950, when SRO ceased to do business, was handling these great big

super-colossal pictures of David Oliver Selznick; isn't that a fact? A. During the period you have described, yes.

Q. 1946 to 1950? A. Not previously; always not previously.

Q. I am only talking about the period of this lawsuit, 1946 to 1950. A. That's correct.

Q. You had no trouble except terms getting Selznick's pictures played either on the Loew's circuit or the Fox West Coast or any other circuit? A. Trouble in what sense?

Q. Terms, I said. A. You said I had no trouble except terms.

Q. Yes. A. I don't know what you are indicating, Mr. Raftery. Trouble of what kind?

Q. You got the widest distribution possible on
923 every one of those Selznick pictures during that period 1946 to 1950? A. I presume you mean we had no trouble in selling the pictures.

Q. That is right. A. In placing them in the theatres?

Q. Right. A. And the only difficulties or arguments we had were with respect to how much?

Q. Right. A. That is true.

Q. Whether you got 90 percent of the gross or 70-30, 10 or 25 percent, that was the question? A. You are using your imagination, Mr. Raftery.

Q. Terms? A. That's right.

Mr. Raftery: That is all.

The Court: Mr. Gillespie?

Mr. Gillespie: No cross-examination.

The Court: Any redirect examination?

Mr. Wright: Just one question.

Redirect Examination

By Mr. Wright:

Q. In connection with trouble, did you ever have any difficulty as to the time when you could get those
924 pictures exhibited on the subsequent runs? A. Some

difficulties with respect to the regularity of release now and then, yes.

Q. I mean the problem of getting a subsequent run as early— A. Without delay?

Q. Without delay. A. Sometimes.

Q. Did you have such a problem? A. Yes.

Mr. Wright: Thank you.

Mr. Raftery: No questions.

The Court: All right.

(Witness excused)

The Court: Any further witnesses?

Mr. Wright: No. We have Mr. Gross's schedules here that he just prepared this morning, and I thought the best thing to do was to show them these schedules and have a recess while they examine them.

The Court: We will take a ten-minute recess and show them and see if there is any objection. Then that is the end, is it?

Mr. Wright: Yes, it is.

924a Mr. Raftery: We have no surrebuttal.

Mr. Wright: The testimony of Mr. Moscowitz, there are certain parts that we will read in and I think that will do it.

The Court: You clear those schedules with the other side and see if there are any objections.

(A short recess.)

925 Mr. Wright: We will ask to have marked as Plaintiffs' Exhibit 32 a chart prepared by Mr. Gross headed "Data As To Circuit Rentals On Eagle Lion Pictures Which Played on Loew or RKO Circuits."

The Court: Received without objection.

Mr. Raftery: This is not an objection, it is merely that some of these pictures, I believe, were sold on a combined contract, like your Honor saw yesterday, and the allocations of film rental were made by Eagle Lion, and I refer particularly to the Jackie Robinson Story and G.I. Joe.

We don't quarrel with them. If Mr. Gross got on the stand, I have no doubt he would testify that is what his books show, and with that one reservation as to authenticity, that allocation may have been made by Eagle Lion—

The Court: Received in evidence.

(Marked Plaintiffs' Exhibit 32 in evidence.)

Mr. Wright: I will now ask to have marked as Plaintiffs' Exhibit 33 a schedule prepared by Mr. Gross headed, "Data As To Circuit Rentals of the 96 Pictures Sample Furnished by Eight Major Distributors in RKO and Loew Circuits."

The Court: No objections? Received in evidence, Plaintiffs' Exhibit 33.

926 (Marked Plaintiffs' Exhibit 33.)

Mr. Wright: And I will ask to have marked as Plaintiffs' Exhibit 34 the schedule prepared by Mr. Gross showing the interval between the first-run Broadway and first neighborhood run on all Eagle Lion films which played long-half on RKO or Loew circuits.

(Marked Plaintiffs' Exhibit 34.)

Mr. Wright: As Plaintiffs' Exhibit 35 we will ask to have marked in evidence the four sheets which Mr. Gross prepared in response to the schedules that have been submitted here as RKO A and which were given to the defendants at the pretrial examination of Mr. Gross.

The Court: What are they?

Mr. Wright: They are a response to Exhibit A, using the same categories Mr. Raftery did on his exhibit, and applying those categories to the defendants' films in so far as we had them.

RKO A is an exhibit Mr. Raftery had prepared, showing a breakdown of Eagle Lion films by classification as to character of first-run theatre or no first-run, and the exhibit I have just marked is a comparable breakdown for the major distributors' films.

The Court: Received.

927 (Marked Plaintiffs' Exhibit 35.)

Mr. Wright: Then we should like to read into the record as an admission against the defendant Loew, Inc. the stipulated testimony of Charles C. Moskowitz, which was given at the hearing on the remand in the Paramount case on November 8, 1948, and I will only read the parts that we are interested in, and I assume Mr. Gillespie can then read whatever parts he thinks are necessary to illuminate that. All I was going to read is the testimony concerning the division of the majors' films.

The Court: Is there any objection?

Mr. Gillespie: With respect to this proposal of plaintiffs, I have told them that it would not be necessary to call Mr. Moskowitz down here with respect to this proof; we would object to its relevance and materality to this issue.

Might I suggest, in order to expedite this that I would be willing to sign a written stipulation reserving our objections and to put in it the testimony that Mr. Wright wants to put in and any that I would want to put in, and we will submit it to your Honor.

I think, for Mr. Wright to read part of this and
928 then for me to read some more and so on would take a considerable period of time, and I think this would take care of the matter.

I told Mr. Wright it would not be necessary to bring Mr. Moskowitz down to actually say he said these things.

The Court: Then can we have a stipulation that if Mr. Moskowitz were called as a witness at this trial he would testified that he had made the following statements in the Paramount case?

Mr. Gillespie: That is correct, your Honor.

The Court: And then it is also stipulated, Mr. Moskowitz was at that time an officer of Loew's?

Mr. Gillespie: And so stated in the testimony, your Honor.

The Court: And would it be stipulated, if Mr. Moskowitz testified today, he would testify as he did in the testimony that he gave?

Mr. Gillespie: I think there is no question of that, your Honor.

The Court: Well then, so the record may be complete, why not let Mr. Wright read that bit of testimony which he wishes to offer now with the understanding that
929 that is testimony which Mr. Moskowitz would give in this case if he were called as a witness, and you may read any other part?

Mr. Gillespie: Well, your Honor, I don't want to drag this out, but I do think that we would like to see—if this is going to go in, apparently there are four theatres involved, about four, there may be one more or one less—I think that what we would prefer to do is just stipulate a full account with respect to those four theatres into the record here on the basis that your Honor stated.

The Court: Full testimony?

Mr. Giliespie: Full testimony.

The Court: I would like to have it in the record. I would like to hear it, so I will know what it is all about. How much do you intend to read?

Mr. Wright: I was only going to read a very brief part of it. I would be perfectly happy to have the reporter copy it in, if that is agreeable.

The Court: How many pages?

Mr. Wright: The pages run from 125 through 134. Those are printed pages like this.

Mr. Gillespie: Your Honor, this may expedite it.
930 If Mr. Wright will state the name of the theatre and its location and then read the portion that he desires to read, it will be agreeable with me.

Mr. Wright: All right.

The Court: Will that be all right?

Mr. Wright: Surely. I just want to read the preliminary statement about his connection with the theatre.

The Court: All right, you read that.

Mr. Wright: (Reading):

"* * * I was connected with the operation of Loew's Theatres in the greater metropolitan area of New York City, and for about 25 years preceding the death in November, 1945, of David Bernstein, former treasurer of Loew's, Incorporated, I was in charge of these theatres. After the death of Mr. Bernstein I became treasurer, but I am still kept currently informed as to matters concerning all Loew's theatres.

"The testimony which I give below with regard to Loew's theatre interests, is based either on my best recollection of personal participation in the matters testified to or on information acquired by me over my 35 years of service with Loew's Incorporated, and its predecessor companies."

931 The first theatre dealt with is the Gates Theatre, 1037 Gates Avenue, Brooklyn, New York.

Mr. Raftery: Please don't drop your voice.

Mr. Wright: And he makes the statement at page 127 as follows:

"The Gates Theatre has a seating capacity of 2926 and usually plays the product on subsequent run of Loew's, Paramount, Columbia, United Artists and one-half of Universal with a clearance that has never been greater than seven days."

Then the next theatre he covers is Loew's Prospect, Flushing, Long Island. A similar statement, as to the Prospect, which is at 127-128, is as follows:

"The Prospect has a seating capacity of 2322 and generally shows the product of Loew's, Paramount, United Artists, Columbia and one-half of Universal on a subsequent run in Queens County."

The Court: Keep your voice up. I can't hear you.

Mr. Wright: I am very sorry.

The next statement is with respect to Loew's Valencia and Hillside Theatres, Jamaica, Long Island, New York, and at page 129 a statement appears with respect to the Valencia as follows:

932 "The Valencia exhibits pictures following their first-run exhibition on Broadway, New York. It shows generally the product of Loew's Paramount, Columbia, United Artists, and one-half of Universal. The Hillside exhibits these pictures on a subsequent run seven days after the Valencia showing."

The next metropolitan theatre statement is Loew's Theatre Yonkers, which is at page 131, where he makes the following statement as to that theatre:

"Loew's Theatre, with a seating capacity of 2616, generally exhibits following the first-run Broadway the product of Loew's, Paramount, Columbia, United Artists and one-half of Universal."

The next theatre covered is the Loew's Theatre at Mount Vernon, New York, where he says at page 132:

"Loew's Theatre has a seating capacity of 2362 and generally exhibits the product of Loew's, Columbia, Paramount, United Artists and half of Universal following their exhibition first-run Broadway, New York City."

The next statement is as to the Loew's Theatre New Rochelle, at page 133, where he says:

933 "Loew's Theatre has a seating capacity of 2485, and generally exhibits after Broadway, New York, the product of Loew's, Columbia, Paramount, United Artists and half of Universal in competition with RKO's Proctor's Theatre (2688)."

And that concludes Mr. Moskowitz's statement.

The Court: As of what date did he say that?

Mr. Wright: That is as of November 8, 1948.

Mr. Raftery: That is offered only against Loew's, as I understood your offer.

Mr. Wright: I say it is an admission by Loew's. Of course, all the testimony in the case is offered generally on the co-conspirator theory.

The Court: The Court will take it into account.

Mr. Raftery: We object to it as not binding on the RKO defendant.

The Court: Any further evidence?

934 Mr. McGovern: We have, I think, only one additional point. I should like to correct in the record an error that, I think, has some consequence.

At page 42 of the record Mr. Gross was asked:

"Q. What is the figure for the long half bottom feature?"

And he answered, "The long half second feature, of which there were 22 in these samples, the average is $40,000."

He was then asked: "How about the short half?"

And he answered, according to the present transcript, Judge Dawson:

"The short half, of which there were 17, the average is $60,000."

That should be $16,000.

The Court: Any objection to making that correction?

Mr. Raftery: I think he is right.

The Court: $16,000.

Mr. Wright: I notice in checking here that there is one theatre I thought was covered by Mr. Moskowitz, which was in fact covered by Mr. Vogel, and I would like to read his statement with respect to the Loew's State Theatre at White Plains, which appears at page 139.

935

The stipulation as to Jospeh R. Vogel appears at 134, where he says: "I am a vice-president of Loew's, Inc., in charge of all Loew's motion picture theatres in the United States. I was first employed by the predecessor of Loew's, Inc. on October 10, 1909. In 1924 I became as-

sistant to Edward Schiller, who was in charge of Loew's theatres outside of the greater metropolitan area of New York. About 1935 I succeeded Mr. Schiller and was placed in charge of out-of-town theatres. In 1945 I was placed in charge of all of Loew's theatres.

"The testimony, which I give below with regard to Loew's theatre interests, is based either on my best recollection of my personal participation in the matters testified to or on information acquired by me over my thirty-nine years of service with Loew's, Inc., and its predecessor companies."

And the statement I wish to read is made with respect to the Loew's State Theatre, While Plains, New York, at 139. That is where the theatre is mentioned.
936 The statement I am going to read appears on the next page, 140, where he says:

"The Loew's State has a seating capacity of 1,552, and usually exhibits following first run Broadway, New York City, the products of Loew's, Paramount, Columbia, United Artists and half of Universal."

There is, I think—

Mr. Gillespie: I would like to point out that Mr. Vogel is testifying there by stipulation in respect of what are regarded as out-of-town theatres rather than the Loew's metropolitan or in-town theatres.

Mr. Wright: That is right.

The Court: Anything else?

Mr. Wright: There is one thing more. I think we have a stipulation that the separation of the RKO Radio Pictures, Inc. from the RKO Theatres, defendant, occurred on January 1, 1951. Is that corect?

Mr. Raftery: The actual date was December 31, 1950.

Mr. Wright: All right, December 31, 1950. And as to the date on which the Loew's distribution business was separated from the Loew's theatres was on September 1, 1954.

937 Mr. Gillespie: I believe that is correct, Mr. Wright.

The Court: Anything further?

Mr. McGovern: Nothing further.

The Court: Everybody rests?

Mr. McGovern: Plaintiffs rest.

The Court: Both defendants rest?

Mr. Raftery: We rest.

Mr. Gillespie: Defendant Loew's rests.

Mr. McGovern: Your Honor, could I just ask what your own preference is with regard to the handling of the exhibits.

We have a problem, using them ourselves.

The Court: I presume each counsel will want to keep their exhibits until they have completed their brief. My suggestion is you submit with your briefs the exhibits that you have offered in evidence. The plaintiff will submit the plaintiffs' and the defendants will submit the defendants' and I would also suggest that if you could, that you have the exhibits put in separate envelopes, separate folders, properly marked. It will save them getting mixed up both in the judge's chambers and in the courthouse. If we get a lot of them with just numbers on them, it

938 is pretty hard to get them together when we want them.

Now, all sides rest.

Mr. Raftery: I want to renew the motions to dismiss that were made at the close of the plaintiffs' case, now at the end of the whole case, on the ground that plaintiffs have failed to make out a prima facie case and all the other grounds that are usually urged on a motion to dismiss.

The Court: The Court will reserve decision.

Mr. Raftery: And I also want to move on behalf of the defendant RKO for judgment on the merits for the defendant RKO.

The Court: The Court will reserve decision on that motion.

Mr. Gillespie: And, your Honor, I make the same motion,

to the extent Mr. Raftery has made his motion, on behalf of the defendant Loew's.

The Court: The Court will reserve decision on that motion.

Now, for the filing of briefs and proposed findings of fact and conclusions of law, my suggestion would be that they be exchanged and filed in my chambers on March
939 9th, which is three weeks from today, and that reply briefs, if any, be exchanged and filed in my chambers on March 16th.

Mr. Raftery: On the proposed findings and proposed conclusions, do you think it would be more practical on those to defer them until after the decision, because we would base the findings, then, on your decision.

The Court: Mr. Raftery, my suggestion would be that each side file their proposed findings of fact and conclusions of law at the same time as they file their original briefs.

Mr. Raftery: How would it be if we filed them at the time of the reply brief when we know what they are contending?

The Court: If you wish, you can do it at the time of the reply brief.

Mr. Raftery: I think that would be better.

The Court: I would like to have the proposed findings and proposed conclusions at that time for this reason: That the Court of Appeals frowns upon the judges in the lower eschelons merely adopting findings submitted by a party. Therefore, I presume I will have to prepare my own findings of fact and conclusions of law which may be embodied in an opinion or may be separately stated, but in
940 order to make certain that I have all of the issues before me at the time I prepare my findings of fact or write my opinion, I like to get the proposed findings of fact and conclusions of law from both sides so that I can double check them and make certain that I have covered all of the issues which either side thinks is material in the case.

If that is the situation, then I guess we can adjourn this case.

I wish to express to all of you my appreciation for the very fine manner in which this case was conducted. It is a pleasure to have a case conducted by able counsel, gentlemanly counsel. We don't always have that.

Mr. McGovern: Your Honor, I am sure I reflect the opinion of all of us when I say we appreciate the courtesy and patience you have shown.

(Discussion off the record.)

(Trial concluded.)

Opinion of Judge Archie O. Dawson

1365 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 61-166

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC., *Plaintiffs*,
against
LOEW'S INC., RKO THEATRES, INC. and RKO FILM BOOKING CORP., *Defendants*.

APPEARANCES:

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DAWSON, D.J.:

This is an action tried by the Court without a jury wherein the plaintiffs seek treble damages under
1366 the anti-trust laws, 15 U.S.C. 1, 2, 15, against

Loew's, Inc. (hereinafter called "Loew's") and RKO Theatres, Inc. and RKO Film Booking Corp. (hereinafter called "RKO").

Proceedings Prior To Trial

The complaint was filed on October 3, 1950. It named as defendants all of the distributor defendants named in *United States* v. *Paramount Pictures, Inc.** (hereinafter called the "Paramount case"). As to the distributor defendants, it sought injunctive relief. As to the present defendants, it sought injunctive relief and treble damages in the amount of $15,000,000 plus attorneys' fees.

In the original complaint, Eagle Lion Classics, Inc. was named as one of the parties plaintiff. In 1951, this corporation was sold to United Artists Corp., one of the distributor defendants. Following a settlement of disputes which arose over the contract of purchase, Chesapeake Industries, Inc., the parent corporation among the plaintiffs, gave United Artists a release on December 31, 1953. Thereafter, on the defendants' motion, Judge A. N. Hand dismissed the complaint, 121 F. Supp. 128, on the grounds

1367 that the sale of Eagle Lion Classics, Inc., the only party plaintiff threatened by the conspiracy, made the claim for injunctive relief moot, and that the claim for damages against the exhibitor defendants had been released by the release of one joint tortfeasor without reserving rights against the others. The plaintiffs appealed the dismissal of the complaint, insofar as it related to the damage claims. The Court of Appeals reversed on the ground that none of the claims for damages was the subject of the release, 219 F. 2d 196 (Feb. 1, 1955). This action, therefore, involves only the claim for damages against the two remaining defendants, Loew's and RKO.

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* 66 F. Supp. 323 (1946); 70 F. Supp. 53 (1946), reversed and remanded in part, 334 U.S. 131 (1948); 85 F. Supp. 881 (1949), aff'd 339 U.S. 974 (1950).

The Issues

The complaint is based exclusively on alleged violations of the anti-trust laws. The issues were framed in a pre-trial order entered by Judge Ryan of this Court on November 2, 1953. Such issues must, in the absence of modification, control the subsequent course of the action (Calendar Rule 18, S.D.N.Y.). The issues as set forth in the pre-trial order are as follows:

"1. Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?

"2. If so, were the plaintiffs directly damaged in their business or property as the result of the
1368 said illegal combination and conspiracy and, if so, in what amount?"

The Facts

1. *The parties*

There are four affiliated parties plaintiff (referred to herein as "the plaintiffs") to the present suit:

Eagle Lion Studios, Inc.—a California corporation engaged in the business of producing motion pictures up to 1949;

Eagle Lion Films, Inc.—an Ohio corporation engaged in the business of distributing the films produced both by its affiliate (above) and by other producers from 1945 until June, 1950;

PRC Productions, Inc.—a Delaware corporation organized in 1943 and engaged in the business of producing motion pictures until 1946 when all of its assets were transferred to Eagle Lion Studios, Inc., above; and

Chesapeake Industries, Inc. (formerly Pathe Industries, Inc.)—an Ohio corporation which owns all of the stock of the other three parties plaintiff.

There are at present three defendants:

Loew's, Inc.—a Delaware corporation, now engaged in the business of producing and distributing motion pictures and formerly, at the times material to this action, engaged in the exhibition of motion pictures in theatres owned or controlled by it either directly or through subsidiaries;

RKO Theatres, Inc.—a New York corporation engaged in the business of exhibiting motion pictures in theatres owned or controlled by it; and

RKO Film Booking Corp.—a new York corporation engaged in the business of booking films for exhibition.

1369 Originally there were six other defendants, all nationwide film distributors, but the action was dismissed as to them.

The defendants are corporations which operate those motion picture theatres in metropolitan New York which are known, respectively, as the Loew's and RKO circuits.

2. *Area involved in the action*

The New York metropolitan area, which under the pretrial order is the area involved in this action, is defined in the complaint as "the five boroughs of greater New York City, southern portion of Westchester County and western portion of Nassau County, New York State." No part of the State of New Jersey is included in the New York metropolitan area, as defined in the complaint and in the interrogatories submitted by the plaintiff.

3. *Period of time involved in the action*

The complaint alleged that the conspiracy which caused it damage began prior to 1944, but it was stipulated that the only claim for damages was in the period from Sep-

tember 1, 1946 to September 1, 1950. The action was instituted on October 3, 1950.

4. *The activities of the plaintiffs prior to September 1, 1946.*

In 1943, PRC Productions, Inc. was created to
1370 produce low budget pictures, and PRC Pictures, Inc. was created to distribute those low budget pictures. In 1946, PRC Pictures, Inc. was dissolved, and its distribution activities were assumed by Eagle Lion Films, Inc. and its assets were transferred to Eagle Lion Studios, Inc. In that year, the parent company, Chesapeake Industries, Inc. (then known as Pathe Industries, Inc.) decided to make and distribute higher budget pictures, and determined that its subsidiary, Eagle Lion Studios, Inc. would produce them and Eagle Lion Films, Inc. would distribute them. This was in part because of the fact that in 1945, an informal agreement was reached with the J. Arthur Rank organization of England which provided, in effect, that Chesapeake Industries, Inc. would produce a minimum of five pictures a year for distribution by the J. Arthur Rank organization in England and other areas, and that the English company would produce five pictures to be distributed by Chesapeake Industries, Inc. or its affiliates. This agreement was reached informally in 1945.

In September, 1946, Chesapeake created Eagle Lion Films, Inc. to distribute the pictures in accordance with this contract, and in November, 1946, created Eagle Lion Studios, Inc. to produce the pictures. The agreement with the J. Arthur Rank organization was not formally signed until April 18, 1947. Eagle Lion Studios, Inc. was put into funds to take over the production facilities of a studio in Hollywood, California, and a million and a half dollars was invested to put it in condition to make these pictures. Eagle Lion Studios, Inc. continued to make
1371 some low budget pictures and some westerns, but also embarked upon a program of making some more expensive pictures.

During all of the years from 1946 through 1951, plaintiffs' motion pictures activities resulted in a loss. This loss, however, was not merely in the distribution of pictures. The figures introduced in evidence showed that in this five-year period, the average annual loss of the plaintiffs was $2,271,573 in its production activities, and $495,425 in its distribution activities. These figures represent plaintiffs' activities on a worldwide basis. This action is merely limited to the situation in the New York metropolitan area and in connection with the licensing of pictures on runs "subsequent" to first run theatres.

5. *Subsequent run theatres*

"Subsequent run" means all theatres except the approximately 40 first run theatres principally concentrated in the Broadway midtown area and includes first subsequent run, second subsequent run, and so forth. The total number of subsequent run theatres in the area involved and in the period involved has been variously estimated at from 600 to 800. Subsequent run theatres are frequently called "neighborhood theatres".

Of these subsequent run theatres, there were during 1946-1950 operating on a first neighborhood run basis some 44 or 45 theatres belonging to Loew's, some 31 to 36 theatres belonging to RKO, and some 17 others. Loew's also
1372 operated 13 or 14 second neighborhood run theatres, and RKO operated from 1 to 3 second neighborhood run theatres. First run neighborhood theatres were theatres which ordinarily displayed the pictures following a run in the first run theatres. However, there were times when pictures would be shown in the first run neighborhood theatres even though they had not been shown in first run theatres. The plaintiffs have not complained of any discrimination against their pictures in the first run theatres, but base their complaint solely upon the failure to license their pictures for the first run neighborhood theatres of the RKO and Loew's chains.

In addition to the Loew's and RKO circuits, there were in 1948 seven other subsequent run circuits in the area comprised of between 29 and 78 theatres each and totaling altogether some 252 theatres.

In the event that a picture did not play on a first neighborhood run circuit, it became that much more difficult to play in subsequent run theatres. By the same token, if a picture did not play in a first run theatre in the Broadway area, it became that much more difficult to secure a commitment for the showing of the picture on the first neighborhood run circuit.

In addition to the theatres above described, there was another group of theatres known as the "art" theatres which customarily played single films instead of
1373 double features, usually at a higher admission charge than a first run neighborhood theatre, and frequently played foreign films.

6. *Films distributed by the plaintiffs*

In the period in question, there were distributed by the plaintiffs 195 pictures; one picture "Red Shoes" was distributed twice so that in some of the evidence, the total is given as 196 pictures.

7. *Method of selling pictures*

The general procedure for selecting pictures to be exhibited either on the circuits or in individual theatres is for the company which is distributing them to make arrangements for the exhibition of the picture in a projection room maintained by the exhibitors. These exhibitions are known as "screenings". Thereafter, the exhibitor discusses the terms that it is willing to pay for the picture and how the picture is to be displayed, and negotiations take place for the price to be paid for the picture. The circuits in the New York metropolitan area customarily had changes of pictures twice a week. Some pictures were shown on the "long half" which meant that the picture played approximately five or six days a week, and some

played on the "short half" which meant that the picture played one or two days of the week. Generally, two pictures were played together with one receiving "top billing".

Sometimes the two were given equal or "split bill-
1374 ing". Ordinarily the distributor received a percentage of the gross admissions receipts only for the pictures playing the top of the long half, or a split billing of the long half. For the rest it received a flat rental and this was regarded as less favorable.

8. *Screenings of the pictures distributed by the plaintiffs*

The undisputed testimony was that of the 195 pictures distributed by the plaintiffs in this period, Loew's "screened" not less than 108 pictures and RKO "screened" at least 129 pictures. No contention has been made that the defendants refused to "screen" these pictures with a view toward seeing whether they would be purchased by them. Plaintiffs concede, for example, that defendants "screened" all of plaintiffs' pictures made available to it for that purpose.

9. *Eagle Lion Pictures exhibited by the defendants*

Of the 195 pictures distributed by the plaintiffs during the period in question, the defendants exhibited 85 pictures on one or the other of its circuits in the New York metropolitan area. The playing terms of the 85 were as follows:

No. played long half top or split billing	8
No. played long half second billing	24
No. played short half	53
Total	85

1375 Each of the defendants exhibited certain other pictures distributed by the plaintiffs in one or more theatres amounting to less than the full circuit. Loew's played some 39 additional pictures in addition to the 50 which it played on the entire circuit. RKO exhibited in

one or more of its theatres during the period in question some 55 additional pictures. The evidence shows that during the period in question, Loew's licensed pictures from 38 distributors and RKO licensed pictures from over 30 distributors.

10. *Sale of plaintiffs' distribution business*

Plaintiffs, throughout their entire history, have been weak companies. During the years 1946 through 1951, the plaintiffs lost over $13,000,000 in the production of films and nearly $3,000,000 in the distribution of films. These losses were admittedly not the result of any competitive situation which might have existed in subsequent run theatres in the greater New York metropolitan area. Plaintiffs contend that their damages in that area would have been only $417,000.

As a matter of conceded fact, plaintiffs had enough pictures to operate at a profit only during the last six months of 1950 when Eagle Lion obtained a substantial number of additional pictures through merger negotiations with Film Classics. The additional revenue from these additional pictures "began to die out" early in 1951, as
1376 stated by the President of Chesapeake Industries, Inc., and the distribution business was sold to United Artists Corporation. The loss on this sale was computed by the accountant called as a witness by the plaintiffs as $146,440.

Although plaintiffs had been losing money throughout their entire history, the amount of total gross film rentals which they received was not insignificant. In the seasons 1946-1947 through 1949-1950, plaintiffs earned total gross film rentals on the 195 films which they distributed of $39,107,800 in the domestic market, of which $2,362,200 was received from neighborhood theatres in the greater New York metropolitan area.

11. *Nature of the Eagle Lion pictures*

The 195 Eagle Lion pictures included about 40 "Westerns", 43 foreign films which were made abroad, and 26 re-issued films. A re-issued film is one which has been distributed through the Country and which is later released, at the discretion of the distributor, for further distribution and exhibition. A reissued film was ordinarily not played on a first neighborhood run basis. Few of the foreign made Eagle Lion films were shown in the circuits of the defendants. These films were customarily shown in the so-called "art" theatres not affiliated with either circuit. However, all foreign made Eagle Lion films grossing less than $500,000 took 13.2% of their total domestic rental out of neighborhood theatres in the New
1377 York metropolitan area, which was substantially greater than the percentage of rental received from this area by all Eagle Lion films.

12. *Ratio of subsequent run rental from metropolitan New York to national film rental*

The ratio of subsequent run rental from metropolitan New York to national film rental, less such subsequent run rental, was as follows:

Eagle Lion

No. of Pictures	*Pictures with National Film Rental*	*Ratio of Metropolitan Sub-run Rent to National Less Metropolitan Sub-run Rent*
97	Under $100,000	6.9%
51	100,000 to 200,000	5.4%
10	200,000 to 300,000	6.7%
16	300,000 to 400,000	5.9%
3	400,000 to 500,000	8.6%
18	Over 500,000	6.7%
195		6.4%

1378 *8 Distributors**

No. of Pictures	*Pictures with National Film Rental*	*Ratio of Metropolitan Sub-run Rent to National Less Metropolitan Sub-run Rent*
7	Under $100,000	5.2%
10	100,000 to 200,000	4.9%
7	200,000 to 300,000	6.6%
6	300,000 to 400,000	5.1%
5	400,000 to 500,000	7.1%
61	Over 500,000	9.2%
96		8.9%

* These were not all the films distributed by the 8 distributors in the four-year period, but were median pictures selected as representative of the entire distribution by the plaintiffs in preparing their statistical studies.

13. *Pictures available for exhibition*

The circuit of each defendant used only about 104 features per year as its long half attractions, being two features per week per circuit. The eight major distributors distributed, in the four year period, over 1,000 features, or more than 250 features per year. Eagle Lion distributed in that four-year period a total of 195 pictures.

1379 *Discussion*

The primary issue in this case is, in the language of the pre-trial order,

> "Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?"

No proof was offered that plaintiffs were entirely excluded from licensing their pictures to these theatres in

that area. As has heretofore been shown, many of their pictures were in fact licensed for exhibition to the Loew's and RKO circuits in New York. The only question would be whether plaintiffs were excluded from the opportunity of licensing such pictures "on a competitive basis". This would involve the question as to whether, in the licensing of their pictures, plaintiffs were discriminated against so that they did not have an equal competitive opportunity.

Plaintiffs offered no direct proof that there was, in fact, any combination or conspiracy between the defendants to deprive the plaintiffs of an equal competitive opportunity to license their films. The presidents of both defendants denied explicitly that there was any agreement between the defendants relating to the licensing of pictures of the plaintiffs or that either of them knew about the negotiations which the other had with reference to licens-
1380 ing pictures from the plaintiffs. Plaintiffs offered no testimony of any of their sales executives with reference to efforts made to secure licensing of pictures distributed by them during the period covered in the complaint from which any inference could be drawn that they were discriminated against. The only testimony of an officer of the plaintiffs was the testimony of Mr. MacMillen, the president of Chesapeake Industries, Inc., who stated that he "personally had nothing to do with the sale or distribution of pictures to the exhibitors", but who testified that after the decree had been entered in *United States* v. *Paramount* in the first part of 1950, he went to the offices of the defendants and complained about discrimination, saying to the president of RKO "that unless we got competitive access to the circuit we would have no alternative but to bring a suit for damages under the anti-trust laws." Whether this was a threat to secure better terms in the future from the defendants or whether it was a justifiable complaint certainly does not appear from the testimony of Mr. MacMillen who admitted that he knew nothing about the sale and distribution of pictures.

If plaintiffs had been discriminated against in the competitive licensing of their pictures to the defendants, it is strange that some testimony was not produced by the plaintiffs from those persons who had been its officers and agents in the period covered by the complaint to show what efforts they made to get specific pictures exhibited by these defendants and what the results were of such efforts. No such evidence was introduced. In fact, plaintiffs admitted that they had no complaint as to their
1381 treatment on any particular picture.

The defendants, on the other hand, called as their witness Max Youngstein, who had been in charge of "advertising, publicity and exploitation" for plaintiff Eagle Lion Films for two years from 1946. His testimony did not indicate that the treatment of plaintiffs' pictures on the circuits of the defendants was due to any effort of the defendants to deprive plaintiffs of a competitive position. He stated that the poor returns on plaintiffs' pictures was due to the fact that the films of the plaintiffs were, from the standpoint of box office appeal, at "the very bottom rung of the ladder" and "much inferior" to films which were being offered by other distributors.

The plaintiffs did not establish that they were excluded from either of the circuits or that their pictures were allocated as between the circuits. Nor have they produced any evidence which would indicate that one of the defendants consulted with the other with reference to the exhibition of plaintiffs' pictures. Plaintiffs have had several years to prepare this case for trial and ample opportunity to invoke the discovery processes of the Court, and if any such evidence was available, it may be assumed that plaintiffs would have secured it.

Plaintiffs, in the absence of direct proof that there was a combination or conspiracy of the defendants which deprived them of the opportunity to license their pictures on a "competitive basis", relied upon two items of
1382 proof: (1) the decree and findings of fact and conclusions of law in the *Paramount* case, and (2) the

fact that the ratio of plaintiffs' receipts for subsequent run metropolitan New York theatres as compared to their national receipts differed from the average ratio of the eight major distributors.

The first question, of course, is whether the decree and the findings of fact and conclusions of law in the *Paramount* case established as a fact that the defendants combined and conspired to exclude plaintiffs from the opportunity of licensing their pictures on a competitive basis in the Loew and RKO circuits during the period involved in the action. Plaintiffs rely on § 5 of the Clayton Act, 15 U.S.C. § 16, which makes final judgments in government anti-trust suits "prima facie evidence" in private suits. The effect of § 5 is to give the private litigant the benefit of the doctrine of estoppel by judgment as if it had been a party plaintiff to the government suit. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951). For this reason the Court accepted in evidence the decree in the *Paramount* case and the findings of fact and conclusions of law in that case.

The defendants assert that the *Paramount* case had nothing to do with the subject of the present action. In large part, that is true because the primary issue in that case related to the effect under the anti-trust laws of a combination between the large producers of motion pictures who also controlled, to a substantial extent, the places of exhibition of those motion pictures. Many of the findings of fact and conclusions have nothing to do
1383 with the issue in this case.

General findings of violation of the anti-trust laws in the *Paramount* case are insufficient to impose liability in the present case unless plaintiffs have introduced evidence to relate those findings to the issue in the present case. See *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 133 F. Supp. 839, 845, 846 (S.D.N.Y. 1955); *Fifth and Walnut* v. *Loew's, Inc.*, 176

F. 2d 587, 593 (2d Cir. 1949); *20th C. Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 859 (8th Cir. 1952). The plaintiffs have not supplied the deficiency by directing attention to any parts of the record in the *Paramount* case that show that the issue involved in this case in this area was adjudicated, *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 958 (2d Cir. 1951).

Plaintiffs, however, specifically rely upon finding of fact No. 154(d)* which would seem to have some relationship, at least so far as the first sentence of the
1384 finding is concerned, to the issue in the present case.

This sentence reads as follows:

> "In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition *between them* in obtaining pictures." (italics supplied)

Conclusion of law No. 16 in the *Paramount* case reads as follows:

> "Loew's, Incorporated, has violated the Sherman Act by conspiring with RKO to monopolize and monopolizing the first neighborhood run in New York City, and by the dividing of that market between itself and RKO."

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* "154(d). In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. On one occasion where Paramount was having a long dispute with Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner, and half of Universal. Accordingly, the showing that 85% of Loew's theatres are in competition with theatres of other defendants is misleading and may properly be reduced by the exclusion of its New York neighborhood theatres. If this is done, it would give Loew a percentage of approximately 42% of its theatres in competition with other defendants in cities over 100,000."

While the findings may perhaps constitute evidence (on which point the Court finds it unnecessary to pass) that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called "independents" such as the plaintiffs in the present case.

Whatever may have been the situation as between Loew's and RKO with reference to the exhibition of their
1385 products and the products of other major distributors, the evidence in this case clearly indicates that during the period involved in the action, there was no arbitrary allocation as between the circuits of the pictures of the plaintiffs or that the defendants excluded the pictures of the plaintiffs. It does not necessarily follow from the fact that there had been an allocation of the major distributors who were defendants in the *Paramount* case that the product of all other independent distributors of motion pictures was allocated or that there was no competition for the product of these independent distributors. Likewise, the plaintiffs have not complained that their product was "divided" or allocated in any particular way by and between the present defendants. The evidence shows clearly that the plaintiffs were not excluded from this market. Under these circumstances, the findings of fact and conclusions of law in the *Paramount* case are insufficient in and of themselves to establish exclusion by any combination and conspiracy. The Paramount case did not involve the issue as to whether plaintiffs were prevented from licensing their pictures on an equal competitive basis to the defendants. Since this issue was not in that case, the decree in that case does not constitute prima facie evidence of any such ultimate fact.

In the absence of proof of actual combination or conspiracy to deprive the plaintiffs of an equal competitive opportunity, plaintiffs would have the Court draw the con-

clusion that there was such combination or conspiracy by a comparison of the ratio of the income received by
1386 the plaintiffs from the subsequent run theatres in New York to the income received nationally as compared to the ratio of the income received by the eight major distributors from the subsequent run theatres in New York to the income which these distributors received nationally. In other words, the plaintiffs contend that the income which they received in the subsequent run theatres in New York, in comparison with the income received nationally and as contrasted with the similar figures for the eight major distributors, would lead to the conclusion that there had been a combination or conspiracy between the defendants to exclude them from licensing their pictures in the subsequent run theatres in New York on an equal competitive basis. Plaintiffs base this upon the hypothesis that if they did not receive for their pictures as large a proportion of income from the New York subsequent run theatres compared to their national gross income, as did the major distributors, it would show that they had been discriminated against in New York. This argument presumes, of course, that they were not discriminated against on a national basis.

Plaintiffs rely upon certain statistical studies made by them. These are combined primarily in an exhibit (Ex. 10) which sets forth two ratios prepared in part from answers to interrogatories by the defendants, including those defendants against whom the action has been discontinued. Exhibit 10 is a chart which reads:

1387 "Ratio of Subsequent Run Rental from Metropolitan New York to National Film Rental Less such Subsequent Run Rental"*

"For all Eagle-Lion Product for Seasons 1946-50 (196 Features)"	"For Representative Product of 8 Major Distributors for Seasons 1946-50 (96 Features)"
6.4%	8.9%

* Subsequent run rental, as used in Exhibit 10, includes that from all theatres except the 40 odd first run. It is not limited to rental from the defendants' theatres.

The 96 representative product pictures of the eight distributors (all defendants in *United States* v. *Paramount*) were picked as follows: all pictures for each distributor for each of the four motion picture years from September 1, 1946 through August 31, 1950 were put in 32 separate lists in order of national rental. Then three median rentals were selected from each list: (1) the median rental for the entire list, (2) that from the top quarter of the pictures, and (3) that from the lowest quarter of the pictures.

The plaintiffs have used the difference in ratios between 6.4% and 8.9%, which is 2.5%, to calculate that by reason of discriminatory practices in the metropolitan New York area, they lost at least $417,000 in net rentals on the films distributed through the four motion picture years in question. They arrived at this sum by taking 2.5% of the difference between their total domestic gross film rentals and their New York metropolitan area neighborhood theatre gross film rentals. The resulting figure of $919,000 was reduced by subtracting a sum which represented the average share (54.6%) of the gross film rental that went to the producer. (Apparently no allowance has been made for any of the other expenses usually incident to the earning of the film rentals.)

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The purpose of using ratios instead of dollar amounts to show the discriminatory effect was, as counsel for plaintiffs explained it, because the pictures of the eight major distributors "all grossed, on the average, substantially more per picture nationally than Eagle Lion did."

This chart may, on the surface, seem to be persuasive for the point contended for by the plaintiffs. However, like all statistical studies, it is necessary to see whether there has been any statistical fallacy inherent in the statistical method used. One of the most insidious of statistical fal-

lacies is the drawing of averages from a body of statistical data which is not comparable in kind or quality.*

There is no more insidiously persuasive, and at the same time unreliable, type of evidence than that produced by taking a group of non-comparable figures, averag-
1389 ing them, and then attempting to draw a conclusion from that average.** An analysis of the underlying data and of the problem sought to be solved must precede any statistical approach. Therefore, any good statistical analysis would seek to ascertain whether the averages, when found, would be constant throughout the run of the data, or whether the averages were the result of particular factors in the data. That is why a plotted curve is frequently a better expression of averages than a mere statement of an arithmetical average of a total of figures.*** If the averages are not constant through the run of the data, it becomes important to ascertain what factors influenced the change in the averages.

An analysis of the data submitted in support of plaintiffs' Exhibit 10 shows that the conclusion of the plaintiffs that their pictures did poorer propotionately in the New York area, when compared to the national figures, than did the defendants' pictures, was a conclusion which was not true as to all pictures. A plotted curve would show

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* "In order for a comparison to yield a meaningful, logical and significant result, the two quantities compared must be of the same quality or kind and must be stated in identical or comparable units. In other words, the variables compared must differ in *quantity only* as measured in *identical units*." Blair, *Elementary Statistics* (Henry Holt and Company, 1944) p. 42.

** Such as saying that if 51% of the population of the United States is male and 49% is female, an average American is 51% male and 49% female, i.e., an hermaphrodite.

*** In the field of statistical analysis, this is called "Regression", which is a comparison between two or more variables. "It ferrets out and expresses in clear, measurable terms the hidden and inner meanings of great masses of numbers which otherwise would remain unknown." Blair *op. cit.* p. 230.

that the ratio varied with the drawing power of the picture as evidenced by the national film rentals.

1390 Thus, if we break down the ratios relied on by the plaintiffs into similar ratios which compare all Eagle Lion films which received national rental of $500,000 or less with the representative pictures of the major distributors which also received a national rental of $500,000 or less, and then similarly compare the ratios of pictures which received national rental of over $500,000, we get the following result:

Ratio of Subsequent Run Rentals from Metropolitan New York to National Film Rental, less such Subsequent Run Rental

	Eagle Lion	*Eight Major Distributors*
For pictures having national rental of less than $500,000	6.2%	5.9%
For pictures having national rental of over $500,000	6.7%	9.2%
For entire product	6.4%	8.9%

On pictures which had a national rental of $500,000 or less, it appears that Eagle Lion did as well as or even slightly better than the eight major distributors. It is only when we come to pictures which had a national revenue of over $500,000 that a marked disparity begins, and it is this disparity in these pictures having this greater national revenue which leads to the difference in ratios for the

1391 entire product upon which plaintiffs rely as proof of a conspiracy.

The conclusion which follows from these figures thus broken down must be that Eagle Lion did as well as the eight major distributors in pictures which grossed nationally less than $500,000, and that the eight major distributors had proportionately a greater revenue in the New York area than they did nationally only in those pic-

tures which had a national revenue of over $500,000. We should, therefore, examine the particular pictures which grossed nationally over $500,000 to see whether an inference can be drawn that the disparity evidenced by these ratios was the result of a deprivation of equal competitive conditions from Eagle Lion, or whether it was due to other causes.

Of the 195 pictures distributed by the plaintiffs, only 18, or less than 10%, had gross national revenues of more than $500,000 while 64% of the representative pictures of the eight major distributors had revenues in excess of $500,000. Only seven of the pictures of the plaintiffs had gross national revenues in excess of $1,000,000 (and only one over $2,000,000) whereas 40 of the 96 representative pictures of the eight major distributors had gross national revenues in excess of $1,000,000, of which 18 were in excess of $2,000,000 and eight in excess of $3,000,000.

Boiling down all the statistics produced by the parties, it comes to this: 18 pictures of the plaintiffs which grossed more than $500,000 nationally did not do as well
1392 proportionately in the metropolitan New York area, as compared to what they did nationally, as the pictures of the eight major distributors that grossed more than $500,000 nationally. Was this difference due to a deprivation of an equal competitive opportunity for the plaintiffs?

All 18 of these films each had a first neighborhood run in the entire Loew's or the entire RKO circuit in metropolitan New York. Seventeen of the pictures played the long half of the week, and six had top billing. This is certainly not proof of exclusion or lack of a competitive opportunity. Nor was there any proof that these pictures were entitled to a better place on the circuits.

Is the fact that these pictures did not do as well in New York as they did nationally, even though they were displayed in the circuits, proof of lack of a competitive opportunity? The fact that they did not earn as much in

New York as they did proportionately in the rest of the Country is not persuasive proof that there was discrimination against them. We must remember that we are comparing pictures of the plaintiffs which had a low national gross with pictures of the defendants which averaged nationally many times that of the pictures of the plainiffs. We are considering two different classes of merchandise—one of a moderate grade and the other of a much higher grade—if we take their reception nationally as proof of their real worth, which is what the plaintiffs have done in using the national figures as an adequate basis of comparison.

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Plaintiffs' argument would presuppose that any such merchandise, no matter what its grade, would do proportionately as well in New York as it does nationally. The economic facts of life show how fallacious is this contention. The fact that there are more Cadillacs per capita in New York, or more mink coats per capita in New York, than in the Country as a whole does not establish that there is a conspiracy in New York against cheaper cars or cheaper furs. It is a consequence of the fact that the per capita wealth in the metropolitan New York area is greater than in the Country as a whole and that, therefore, there is a better market at a higher profit in that area for sales of expensive merchandise than in the Country as a whole. By the same token, the cost of living in New York is greater than in the Country as a whole, an economic fact of life which is recognized by most employers and most businesses—except, we may say parenthetically, by Congress in fixing salaries.*

Furthermore, the fact that a picture did better or worse in the Country as a whole than it did in New York is not proof that it was discriminated against in New York or

* However, in the judicial system of the State of New York, this economic fact of life is recognized, for the State Supreme Court Judges in the metropolitan area receive a salary which is $5,000 a year higher than the Supreme Court Judges in other parts of the State.

that it suffered lack of a competitive opportunity in New York. New York, with its multitude of theatres and
1394 variety of films offered to people within easy reach of a number of theatres, may well have a theatre-going population which is more discriminating in its choice of pictures than other cities or towns where the variety of theatres and films is much less in proportion to the population; and thus a good picture may do better proportionately in New York than it does in the rest of the Country where there is not the same degree of choice available. Thus, the evidence was that the success of a picture in New York depends to a great extent upon whether it has had a first Broadway run and upon the reception accorded to the picture by the critics and that this is not comparably true in other parts of the Country.*

1395 One test as to whether the reception of plaintiffs' films in the New York metropolitan area was due to a conspiracy of the defendants or whether it was due to the quality of the films is the reception the films had from an independent exhibitor in this area. The defendants offered the testimony of Russell Downing, the president and managing director of Radio City Music Hall, a large

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* Mr. Youngstein, who had been in charge of exploitation, advertising and publicity of the Eagle Lion films from 1946 until May of 1949, was asked the following question by the Court and gave the following answer:

"Q. Taking the Eagle Lion list of pictures generally while you were there, was it your impression that they would do better or worse proportionately in New York?

"A. Overall, in my opinion they would do worse in New York because they were not to any large extent critics' pictures. New York is one of the few places where critics' reactions help box office and help determine the entire selling of the picture from first run in the circuit, in the second, third and fourth run down the line until you have blanketed the City alone. That is the entire metropolitan territory. The newspapers have that importance.

"The very nature of this product at that time, with the exception of a picture like a Red Shoes or perhaps a Quartet, one or two others, if I took the time out to search through, but overall these were pictures that received terrible reviews in New York, pictures which I would say would do much better outside of New York than in New York."

and representative motion picture theatre which was not in any way affiliated with, or connected with any producer or distributor. Mr. Downing testified:

> "... we try to avoid in the Music Hall—and I feel the Music Hall in a sense is no different from any other theatres in the area—we try to avoid playing pictures that people don't want. It is our job to find entertainment they want and we want pictures they will patronize."

His testimony established that out of the 195 Eagle Lion pictures, only 4 were submitted by Eagle Lion to Radio City Music Hall for screening and consideration, and that even these pictures were not accepted because, in the opinion of the witness, they did not measure up to the standards of the quality required by the Music Hall. No Eagle Lion pictures were shown there in this four year period although each of the eight major distributors had some of their pictures exhibited at that theatre during the period in question.

Although practically all of the films distributed by the plaintiffs were inferior in quality and drawing power to those distributed by the major distributors, the difference in net returns only became markedly apparent in those films which grossed nationally more than $500,000. This is evident when we see that 97 of the 195 pictures distributed by plaintiffs had national film rentals of less than $100,000. Included in those pictures were re-issue pictures of an antiquity which makes them almost part of the folklore of the cinema.*

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* Such as the following pictures which, in the four years involved in this action, had the following gross national revenue:

"GETTING GERTIE'S GARTER"	$17,400
"UP IN MABEL'S ROOM"	17,000
"TWIN BEDS"	15,600
"TILLIE'S ROMANCE"	13,400

Included in the list were also such pictures as "CATTLE QUEEN" which had a national gross revenue in this period of $2,800 and "WEAKER SEX" which had a national gross revenue of $7,300.

But when we come to pictures which grossed nationally more than $500,000, we find that this disparity in quality and drawing power still continued and, in the circumstances, it is not surprising that the ratio from the display of these pictures in the metropolitan New York area by the eight major distributors was greater than that of the plaintiffs. Plaintiffs' contention seems to be that they were entitled to derive from the New York metropolitan area film rentals bearing a ratio not less than the corresponding ratio for the eight major distributors. It must be kept in mind that the Sherman Act does not entitle any person to any particular part of a market. It does no more than guarantee a right to compete equally for so much of
1397 the market as it can capture and hold by legitimate business methods and the providing of merchandise which the customer will take. See *Interborough News Co. v. Curtis Publishing Co., et al.*, 127 F. Supp. 286, at 297 (S.D.N.Y. 1954), aff'd 225 F. 2d 289 (C.A. 2, 1955).

Plaintiffs also urge that when defendants exhibited Eagle Lion Films, they did so only on discriminatory terms or after long delays. No evidence was introduced that any of the terms offered or agreed upon were the result of any conferences, agreements, or understandings between the defendants, or were the direct result of any illegal combination or conspiracy. At one point plaintiffs stated that they had no objection to their treatment on any individual film. But at other times, they referred to the terms which they received on individual films as indicative of what they considered the illegal combination or conspiracy. An analysis of the particular instances cited by the plaintiffs indicates a complete lack of proof that the terms which they received were the result of any illegal combination or conspiracy.

Plaintiffs urge, for example, that the contract terms for the film "T-MEN" were discriminatory. Defendants countered with the argument that the contract for the showing of "T-MEN" was not for that film alone but was for

the showing of two Eagle Lion films on the same program—"T-MEN" and "OUT OF THE BLUE;" and that
1398 from a business standpoint, the licensing arrangements were proper and appropriate. The Court cannot determine, in the abstract, what would have been a fair rental arrangement for these two films. Certainly, there is no proof that the contract arrangement was arrived at as a result of any agreement or understanding of the defendants or that the terms were the result of any combination or conspiracy of the defendants. For example, the plaintiffs offered no evidence of any selling efforts that they made to place these films elsewhere; they offered no evidence that they had attempted to secure an arrangement from RKO or any other circuit for these films.

Plaintiffs urged also that the films "BLACK BOOK" and "TRAPPED" were not shown by the defendants. However, the testimony shows that while one of the defendants was actually negotiating for these films, plaintiffs themselves sold the pictures for a first neighborhood run on another circuit not controlled by either defendant.

Here, again, the argument of the plaintiffs that they received discriminatory terms for the licensing of their films is not supported by any evidence sufficient to lead the Court to conclude that the terms agreed upon were the result of any illegal combination or conspiracy among the defendants. Whether the terms were the result of a poorer quality of the films or inferior selling efforts of the plaintiffs, or were the result of a preference of the defendants to take other films which were then available, is not
1399 established by the evidence. Plaintiffs, who had the burden of proof, certainly did not prove that any of these terms were the result of any illegal combination or conspiracy, nor did they establish that Eagle Lion films were denied an opportunity to be played upon the circuits of the defendants. In fact, as has been pointed out, all Eagle Lion films which had a national gross rental

of $500,000 or more were actually shown upon the circuits of the defendants; and the Eagle Lion films which had a national rental of less than $500,000 derived a higher ratio of returns from the metropolitan New York area than they did from the national area when compared to similar low revenue films of the eight major distributors.

The Court finds as a fact that plaintiffs have failed to prove exclusion of their films by the defendants; that plaintiffs have failed to prove any conspiracy on the part of the defendants to exclude the plaintiffs from the opportunity of licensing their feature motion pictures on a competitive basis to the Loew's and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway; and that plaintiffs have failed to prove that any losses which they may have sustained were proximately caused by any combination or conspiracy on the part of the defendants to deprive the plaintiffs of such opportunity to license their pictures on a competitive basis.

The Court concludes that this lack of proof is
1400 not cured by the mere decree in the *Paramount* case and that the complaint should, therefore, be dismissed. *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629 (C.A. 2, 1952), cert. den. 344 U.S. 875 (1952).

I therefore direct entry of judgment for the defendants dismissing the complaint, with costs.

This opinion shall constitute the findings of fact and conclusions of law of the Court.

Should either party desire enumerated or additional findings, they may be proposed upon notice to the other side at any time within ten days after the date of this order.

Dated: New York, N. Y.

June 11, 1956.

ARCHIE O. DAWSON, U.S.D.J.

Notice of Appeal

Notice is hereby given that Plaintiffs, EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC., hereby appeal to the Court of Appeals for the Second Circuit from the order and judgment entered in the above-entitled matter on June 11, 1956 dismissing the complaint herein.

Dated July 5, 1956.

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New York, New York.

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* * * * * * * * * *

To:

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RKO Film Booking Corp.

Filed with Clerk, U. S. Dist. Ct.—So. Dist. N. Y., 7/5/56, C. V. P.

Judgment

The above-entitled action having been tried before the Honorable Archie O. Dawson, United States District Judge, without a jury, at a term of this Court on February 8, 9, 10, 14, 15, 16 and 17, 1956 in the United States Courthouse, Foley Square, New York, N. Y., and evidence having been offered, and the Court, after due deliberation, having made and filed its decision together with the findings of fact and conclusions of law, dismissing the complaint on the merits and directing judgment to be entered in favor of the defendants, with costs, it is hereby

ADJUDGED AND DECREED that the defendants have judgment against the plaintiffs dismissing the complaint, as supplemented and amended, on the merits; and it is further

ADJUDGED AND DECREED that the defendant, Loew's Incorporated, sued herein as Loew's Inc., recover from the above-named plaintiffs the sum of $302.30 its costs as taxed and have judgment against the said plaintiffs, and each of them, therefor; and it is further

ADJUDGED AND DECREED that the defandants RKO Theatres, Inc. and RKO Film Booking Corp. recover from the above-named plaintiffs the sum of $302.30 their costs as taxed and have judgment against the said plaintiffs, and each of them, therefor.

At New York, New York, in said

District, on July 12, 1956.

ARCHIE O. DAWSON,
United States District Judge
H. A. C.

Judgment entered July 12, 1956.

HERBERT A. CHARLSON,
B.V. *Clerk.*

Amended Notice of Appeal

Notice is hereby given that Plaintiffs, EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC., hereby appeal to the Court of Appeals for the Second Circuit from the order and judgment entered in the above entitled matter on June 11, 1956 dismissing the complaint herein, and hereby further appeal to the Court of Appeals for the Second Circuit from the judgment entered in the above entitled matter on July 12, 1956 dismissing the complaint herein and awarding costs to the defendants.
Dated July 19, 1956.

s/ JAMES L. O'CONNOR,
11 West 42nd Street,
New York, New York.
s/ WILLIAM L. McGOVERN,
1229 - 19th Street, N. W.,
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To:

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Plaintiff's Exhibit 1

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

Filed: Feb. 8, 1950

UNITED STATES OF AMERICA,

Plaintiff,

against

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION (formerly known as VITAGRAPH, INC.), WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGES, INC., and UNITED ARTISTS CORPORATION,

Defendants.

FINAL DECREE

The plaintiff, having filed its petition herein on July 29, 1938, and its amended and supplemental complaint on November 14, 1940; the defendants having filed their answers to such complaint, denying the substantive allegations thereof; the court after trial having entered a decree herein, dated December 31, 1946, as modified by order entered February 11, 1947; the plaintiff and the defendants having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this case to this court for further proceedings in conformity with its opinion dated May 3, 1948; this court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this court; a consent decree having been entered on November 8, 1948, against the

defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation; orders having been entered on stipulation against the Fox, Loew, and Warner defendants respectively, and Loew having further stipulated in the record, with respect to certain theatre interests held jointly with others; and a consent judgment having been entered on March 3, 1949 against defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation; and an order having been entered on April 21, 1949, severing and terminating, as of March 3, 1949, this action as against defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation; and an order having been entered on January 18, 1950 severing and terminating as of November 8, 1948 the action as against defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation;

Now, having considered the proposals of the parties, having duly received additional evidence and heard further arguments after entry of the consent decree against the RKO defendants, and having rendered its opinion on July 25, 1949, and having filed its findings of fact and conclusions of law in accordance with said opinion:

It Is Hereby Ordered, Adjudged, and Decreed that the decree heretofore entered by this court on December 31, 1946 is hereby amended to read as follows:

I.

1. The findings of fact and conclusions of law heretofore made are superseded by the findings and conclusions now entered in support of this decree.

2. The complaint is dismissed as to all claims made against the defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II.

Each of the defendant distributors, Loew's, Incorporated Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.); Twentieth Century-Fox Film Corporation, and the successors of each of them (including but not limited to companies resulting from divorcement), and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre

affiliated with a defendant or with theatres in new circuits which may be formed as a result of divorcement. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

III.

Each of the defendant exhibitors, Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation; and the successors of each of them (including but not limited to companies resulting from divorcement), and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined and restrained:

1. From performing or enforcing agreements, if any, referred to in Paragraphs 5 and 6 of the foregoing Section II hereof to which it may be a party.

2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share in the profits.

5. From continuing to own or acquiring any beneficial interests in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant, or with any company resulting from divorcements provided for in decrees entered in this cause.

6. From acquiring a beneficial interest in any additional theatre unless the acquiring company shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures, provided, however, that the acquisition of a theatre as a replacement for a theatre, held or acquired in conformity with this decree, which may be lost through physical destruction, conversion to non-theatrical purposes, disposition (other than the disposition of a theatre in compliance with this decree) or expiration or cancellation of the lease under which such theatre is held, shall not be deemed to be the acquisition of an additional theatre.

7. From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

1. Within six months from the entry of this decree each of the major defendants named in Sections II and III of this decree shall submit a plan for the ultimate separation of its distribution and production business from its exhibition business. Upon the filing of such a plan, the Government shall have three months within which to file objections thereto and propose amended or alternative plans for accomplishing the same result. Such further proceedings with respect to such plans as the court may then order shall then be had. Such plans shall, in any event, provide for the completion of such separation within three years from the date of the entry of this decree.

2. Within one year from the entry of this decree the Government and each of the defendant exhibitors named in Section III of this decree shall submit respectively such plans for divestiture of theatre interests, other than those heretofore ordered to be divested, which they believe to be adequate to satisfy the requirements of the Supreme Court

decision herein with respect to such divestiture. Upon the filing of such a plan the Government and the affected defendant shall have six months within which to file objections thereto and propose amended or alternative plans for accomplishing the same result. Such further proceedings with respect to such plans may then be had as the court may then order.

3. No defendant distributor named in Section II of this decree, and no distributor company resulting from the divorcement ordered herein, shall engage in the exhibition business; and no defendant exhibitor named in Section III of this decree, and no exhibitor company resulting from the divorcement ordered herein, shall engage in the distribution business, except that permission to a distributor company resulting from divorcement to engage in the exhibition business or to an exhibitor company resulting from divorcement to engage in the distribution business may be granted by the court upon notice to the United States and upon a showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures.

4. No exhibitor company resulting from the divorcement ordered herein shall acquire directly or indirectly an interest in any theatre divested by any other defendant pursuant to any plan ordered under Paragraph 2 of Section IV hereof or pursuant to Paragraph C 1 of Section III of the Consent Judgment as to the Paramount defendants entered March 3, 1949.

V.

Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon

such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries.

VI.

The defendant distributors named in Section II of this decree and any others who are willing to file with the American Arbitration Association their consent to abide by the rules of arbitration and to perform the awards of arbitrators, are hereby authorized to set up an arbitration system with an accompanying Appeal Board which will become effective as soon as it may be organized, upon terms to be settled by the court upon notice to the parties to this action.

VII.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except in so far as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable.

VIII.

1. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on notice to any defendant bound by this decree, reasonable as to time and subject matter, to such defendant at its principal office, and subject to any legally recognized privilege (a) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such

defendant, relating to any of the matters contained in this decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (b) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interviews counsel for the officer or employee interviewed and counsel for such defendant may be present. For the purpose of securing compliance with this decree any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this decree as from time to time may be necessary for the purpose of enforcement of this decree.

2. Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

IX.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree, and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Dated: February 8, 1950.

AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

ALFRED C. COXE,
United States District Judge.

Plaintiff's Exhibit 2

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

Filed 2/8/50

UNITED STATES OF AMERICA,

Plaintiff,

against

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION (formerly known as VITAGRAPH, INC.), WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGES, INC., and UNITED ARTISTS CORPORATION,

Defendants.

FINDINGS OF FACT *

This action having been duly tried and the proofs and arguments of the respective parties having been duly heard and considered, this court, having filed its opinions herein dated June 11, 1946, and July 25, 1949, does hereby find and decide as follows:

1. The following are definitions of terms used in these findings and in the judgment to be entered hereon:

> *Block-booking*—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

* Unless otherwise stated these findings show the situation in 1945.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of the film of which is in excess of 4,000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres, usually comprising a circuit.

Road-show—A public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Runs—The successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on,

and shall include also successive exhibitions in different theatres even though such theatres may be under a common ownership or management.

Trade-Showing—A private exhibition of a feature prior to its release for public exhibition.

2. Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

4. In 1916 or 1917, a group of exhibitors which controlled many of the then best theatres throughout the country organized First National Exhibitors Circuit, Inc. Although this corporation was initially organized to function as a film buying combine, it evolved into a film-producing company first by financing the production of pictures by others for exhibition in the theatres of its members and finally by producing its own motion pictures.

5. The members of the First National group, consisting of many of the most important exhibitors in the United States controlling many of the best theatres, became franchise holders of the distributing company which they formed. They acquired not only the right to exhibit in their own theatres the pictures produced and distributed by First National, but also they each obtained the right to sub-franchise other exhibitors in their respective ter-

ritories. In a short time there were some 3,500 franchise holders, representing as many or more theatres.

6. First National soon began to negotiate for the services of well-known stars and directors in the employ of other producers, including Paramount, and the members of First National began to refuse to exhibit Paramount films. Such well-known stars as Mary Pickford and Norma Talmadge went over to the First National Group.

7. Many of the theatres owned by members of First National had, for a long time prior to 1918, exhibited Paramount pictures. The formation and growth of First National gradually cut down the number of Paramount pictures exhibited in the theatres of the First National group. By 1919 Paramount faced a situation where a group of owners of many of the best theatres in the large cities, many of whom had been its customers in the past, had combined together for cooperative buying and had expanded into a strong organization which distributed its own pictures and threatened to supply its members with enough pictures to permit them to operate without using any pictures of other prodcers, including Paramount.

8. In these circumstances Paramount determined to acquire interests in theatres of its own so that it might assure itself of outlets for Paramount productions. Prior to the fall of 1917 Paramount had no theatre interests. Between 1917 and 1919 it acquired an interest in two theatres in New York City as show windows, to replace the Strand Theatre which had gone over to the First National Group. During that year in conjunction with its representative in the South, it formed Southern Enterprises, Inc., which acquired various theatres in the South. At about the same time Paramount acquired a 50% interest in the Black chain of theatres in New England. Paramount continued to expand its theatre holdings.

9. In January 1932, Paramount went into equity receivership in the United States District Court for the

Southern District of New York. It stayed in equity receivership until March 1933, when it went into voluntary bankruptcy. It remained in bankruptcy until June 1934, when upon passage of Section 77B of the Bankruptcy Law, it petitioned for reorganization. It was finally reorganized under its present name in June 1935. During these years various companies operating theatres in which Paramount was interested were themselves the subject of bankruptcy or receivership proceedings.

10. Some of the theatre interests which Paramount held at the time of the trial of this action had been acquired and were wholly owned by it either directly or indirectly through subsidiary companies prior to bankruptcy and reorganization. In the course of its reorganization, some of its partly owned theatre interests were created, i.e., in some instances the plan of reorganization approved by this court provided for the sale or other disposition by Paramount of a partial interest (sometimes amounting to 50%, sometimes more and sometimes less) in theretofore wholly owned theatre operating companies, or companies holding legal or equitable interests in theatres or theatre operating companies. The result was the creation of many of Paramount's presently partly owned theatre interests.

11. In the course of the reorganization proceedings Paramount lost its interests in some theatres and also changed its relationship with respect to interests in some of its theatre operating companies. The effect of these proceedings and the policy of decentralization inaugurated in the course thereof, was that in some instances Paramount disposed of a partial interest in companies theretofore wholly owned.

12. Loew's Incorporated is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either di-

rectly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

13. Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

14. RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

15. Keith-Albee-Orpheum Corporation was a corporation organized and existing under the laws of the State of Delaware, with a place of busines at 1270 Sixth Avenue, New York, New York, and was engaged in the business of exhibiting motion pictures prior to its dissolution on September 29, 1944. Approximately 99% of its common stock and 33% of its preferred stock were held by Radio-Keith-Orpheum Corporation.

16. RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

17. RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

18. RKO was organized in 1928 by Radio Corporation of America largely for the purpose of obtaining an effective means of developing the use of its motion picture sound recording and reproduction devices in the motion picture production and exhibition fields.

19. At the time of its organization, RKO secured production and distribution facilities by merger with a small company, FBO Productions, Inc., which had limited production facilities and a national distributing organization. RKO invested substantial sums to modernize these facilities.

20. The formation of RKO introduced a new and substantial competitive factor in the production and distribution of motion pictures.

21. During its initial organizational period, RKO acquired interests in a number of companies operating circuits of vaudeville theatres.

22. RKO went into receivership in 1933 and continued in receivership and reorganization until 1940. At the time of its receivership RKO operated considerably more theatres than its present total of 106. During the receivership it lost 57 theatres.

23. The organization of RKO did increase competition in each of the three branches of the industry.

24. Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

25. On April 4, 1923, the four Warner brothers, Harry M., Jack L., Albert, and Sam, transferred their business of production and distribution of motion pictures to a cor-

poration known as Warner Bros. Pictures, Inc. (hereafter referred to as Warner).

26. Beginning in 1925, Warner began the work of developing sound pictures under license and agreements from Western Electric, culminating in the production of such sound pictures as "The Jazz Singer", starring Al Jolson, in October, 1927, and the first 100% talking picture "The Lights of New York" in the summer of 1928.

27. The Stanley Company of America had in 1928 and for a year prior thereto about 250 theatres situated principally in and around Pennsylvania and New Jersey.

28. Negotiations were begun with the view of exchanging stock of Warner for the stock of Stanley Company of America. This transaction was consummated late in 1928.

29. With the acquisition of the stock of Stanley Company of America, Warner acquired 250 theatres which could be immediately equipped with sound installation.

30. In the year and nine months immediately following the acquisition of the stock of Stanley Company of America Warner secured in a similar fashion several other circuits of theatres owning theatres in the same general locality and a smaller number of theatres scattered in various other parts of the country.

31. In 1931 Warner had an interest in 591 theatres, the largest number of theatres in which Warner has ever had an interest.

32. Today, the Warner companies have an interest in 547 theatres—a net reduction of 44 from its peak holdings of 591 in 1931.

33. First National Pictures, Inc., a corporation engaged in the production and distribution of silent motion pictures, had been organized as far back as 1917 by approximately 24 exhibitors on a cooperative basis for the basis of acquiring film of first quality for exhibition in their own

theatres, as well as for distribution by them for other theatres in the respective territories in which they operated.

34. In 1928 Stanley Company of America owned 1/3 of the stock of First National Pictures, Inc., all the stock of First National Pictures, Inc., being subject to a voting trust.

35. Warner acquired as part of the Stanley Company of America transaction in 1928, 1/3 of the stock of First National Pictures, Inc.

36. At or about the time of the acquisition of the Stanley Company of America stock, or shortly thereafter, Warner purchased another 1/3 of the stock of First National Pictures, Inc., from other First National Pictures, Inc. stockholders.

37. Subsequently, in 1929, Warner acquired the remaining 1/3 of the stock of First National Pictures, Inc., from defendant Twentieth Century-Fox.

38. Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures. On July 20, 1944, its name was changed to Warner Bros. Pictures Distributing Corporation.

39. Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

40. Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is en-

gaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

41. Twentieth Century-Fox produces its features in its own studio in Los Angeles, California, distributes them in this country through thirty-one branches or exchanges which it operates in the principal centers of population, and licenses its features for exhibition in its own and other theatres.

42. Twentieth Century-Fox acquired its initial interest in theatres through the purchase of stock in corporations then engaged in operating theatres. Since such original acquisition, it has acquired additional interests in theatres, some of which were acquired in competition with other defendants and with independent circuits and some of which are new theatres constructed by it.

43. National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

43(a). The theatre holdings of the major defendants have played a vital part in effecting violations of the Sherman Anti-trust Act.

43(b). Each of the defendants, Fox, Loew, Paramount, RKO and Warner has since 1940 increased its interest in theatres in which it had had an interest. Fox, Paramount and Warner, and RKO to a lesser extent, have acquired an interest since 1940 in a number of theatres in which they had had no interest prior thereto. The foregoing acquisitions were permitted under the consent decree of November, 1940.

44. Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

45. Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

46. Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

47. Universal Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries. On May 25, 1943, its name was changed to Universal Pictures Company, Inc., when a subsidiary of the same name was merged into it, but Universal Corporation was the surviving corporation.

48. The corporation named in the complaint as Universal Pictures Company, Inc., was a subsidiary corporation, controlled by Universal Corporation, which was engaged in the business of producing motion pictures, prior to its merger into Universal Corporation on May 25, 1943.

49. Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

50. The Universal group of defendants at the time of the trial consisted of the following corporations: (1) Universal Pictures Company, Inc., (hereinafter sometimes called Universal Pictures), a Delaware corporation with its principal office in New York, N. Y., engaged in the business of producing motion pictures and distributing the same through wholly-owned subsidiaries; (2) Universal Film Exchanges, Inc. (hereinafter sometimes called Universal Film Exchanges), a Delaware corporation, with its principal office in New York, N. Y., engaged in the business of distributing motion pictures throughout the United States (except for the Metropolitan District of New York City), a wholly-owned subsidiary of Universal Pictures; (3) Big U Film Exchange, Inc. (hereinafter sometimes called Big U), a New York corporation, with its principal office in New York, N. Y., engaged in the business of distributing motion pictures throughout the Metropolitan District of New York City, a wholly-owned subsidiary of Universal Pictures. The term "Universal" as used herein means any or all of the Universal defendants.

51. Prior to May 25, 1943, the name of Universal Pictures Company, Inc., was Universal Corporation, incorporated in Delaware in 1936. It owned approximately 92% of the outstanding common stock of a Delaware corporation which was incorporated in the year 1925 and was also known as Universal Pictures Company, Inc. Said corporation last-named had its principal office in New York, N. Y., and was engaged in the business of producing motion pictures and distributing the same through its subsidiaries. It owned all of the outstanding stock of Universal Film Exchange, Inc., and 20% of the outstanding common stock

of Big U Film Exchange, Inc. The other 80% of said stock was owned by Universal Corporation. On May 25, 1943, Universal Pictures Company, Inc. (Delaware 1925) was merged into Universal Corporation (the surviving corporation), and the name of the surviving corporation was changed to Universal Pictures Company, Inc.

52. Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

53. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

54. During the entire period in question United Artists Corporation distributed photoplays in the United States of America that were produced by David O. Selznick, Mary Pickford, Charles Chaplin, Hunt Stromberg, William Cagney, Bing Crosby, Edward Small, Sol Lesser, Lester Cowan, Jack Skirball, Benedict Bogeaus, Seymour Nebenzal, Jules Levey, David Leow, Arnold Pressburger, Charles R. Rogers, Andrew Stone, Constance Bennett, Howard Hughes, Preston Sturgis, J. Arthur Rank, Edward Golden, or corporations with which the aforesaid individuals were associated and other independent producers.

55. United Artists Corporation maintains 26 branches or exchanges located throughout the United States, and through these facilities it distributes and has distributed all of the product handled by it during the period in question.

56. Paramount Pictures, Inc.; Loew's Incorporated; Radio-Keith-Orpheum Corporation; Warner Bros. Pic-

tures, Inc.; and Twentieth Century-Fox Film Corporation and their respective distribution and exhibition subsidiaries are the five major defendants. Each of these major defendants represents an integrated unit in the motion picture industry, embracing within its own corporate structure the producing, distributing, and exhibiting phases of the industry. Columbia Pictures Corporation, Universal Pictures Company, Inc. and United Artists Corporation and their respective distribution subsidiaries are the three minor defendants. None of these minor defendants owns or controls any theatres and each is engaged only in the producing and distributing phases of the motion picture industry.

57. As between the eight defendants, Paramount, Loew's, Fox, Warner, Columbia, United Artists, and Universal, there are no officers or directors in common, and none of said defendants owns any controlling stock or other securities in any other of said defendants.

58. Neither of the defendants Columbia, Universal and United Artists owns any theatres.

59. There exists active competition among the defendants and others in the production of motion pictures.

60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures.

61. In the distribution of feature motion pictures no film is sold to the exhibitor; the right to exhibit under copyright is licensed.

62. In licensing features, each of the distributor-defendants has agreed with each of its respective licensees that the licensee should charge no less than a stated admission price during the exhibition of the feature licensed.

63. The minimum admission prices included in licenses of each of the eight distributor-defendants for any given

theatre are in general uniform, being the usual admission prices currently charged by the exhibitor.

64. The defendants' licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors. Thus there was a general arrangement of fixing prices in which both the distributors and exhibitors were involved. The licenses required existing admission price schedules to be maintained under severe penalties for infraction. In the case of such exceptional features as "Gone With The Wind", "For Whom The Bell Tolls", "Wilson", and "Song of Bernadette", licensed for exhibition prior to general release and as to which the distributors were not satisfied with current prices, they would refuse to grant licenses unless the prices were raised.

65. The defendants granting film licenses have agreed with their licensees to a system which determines minimum admission prices in all theatres where feature motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the feature motion pictures exhibited either by the defendants or by independents within the United States.

66. All of the five major defendants have a definite interest in keeping up prices in any given territory in which they own theatres and this interest they were safeguarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas. Even if the licenses were at flat rate, a failure to require their licensees to maintain fixed prices would leave them free for lowering the current charge to decrease through competition the income to the licensor on theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas. There exists great similarity, and in many cases identity, in the minimum prices fixed for the same theatres in the licenses of all of the defendants.

67. The major defendants made operating agreements as exhibitors with each other and with independent exhibitors in which joint operation of certain theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein or are to be jointly determined by other means. These agreements show the express intent of the major defendants to maintain prices at artificial levels.

68. Certain master agreements and franchise between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area in the United States.

69. Licenses granted by one defendant to another disclose the same interrelationship among the defendants. Each of the five major defendants as an exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum admission prices. RKO, Loew's, Warner, Paramount, and Fox, in granting and accepting licenses with minimum admission prices specified, have among themselves engaged in a national system to fix prices, and Columbia, Universal, and United Artists, in requiring the maintenance of minimum admission prices in their licenses granted to these exhibitor-defendants, have participated in that system.

70. The distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices.

71. In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees'

ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission prices practices that other licensees having theatres suitable for exhibition of a distributor's feature in the particular competitive area will also be restricted as to maintenance of minimum admission prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby erected.

71(a). This system also restricted competition between the theatres of the major defendants in those areas where there were theatres of more than one defendant since the minimum price to be charged by any theatre licensee was fixed and the licensee was prevented from competing in the business of exhibition by lowering his price.

71(b). Complete freedom from price competition among theatre holders could only be obtained if prices were fixed by all distributors and such a result was substantially obtained. Consequently the system of theatre licensing had a vital and all-pervasive effect in restricting competition of theatre patronage.

72. The differentials in admission price set by a distributor in licensing a particular feature in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the feature—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher priced prior-run theatres. In effect, the distributor, by the fixing of minimum admission prices, attempts to give the

prior-run exhibitors as near a monopoly of the patronage as possible.

73. Among the provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain feature motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways; in terms of a given period between designated runs; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; in terms of clearances as fixed by other distributors; or in terms of combinations of these formulae.

74. The cost of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

75. Without regard to period of clearance, licensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures.

76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.

77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public.

78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures.

The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business.

79. The major defendants have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents.

80. Some licenses granted clearance to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement.

81. The distributor-defendants have acted in concert in the formation of a uniform system of clearance for the theatres to which they license their films and the exhibitor-defendants have assisted in creating and have acquiesced in this system.

82. The defendants have acted in concert in their grant of run and clearance.

83. Clearances are given to protect a particular run against a subsequent run and the practice of clearance is so closely allied with that of run as to make findings on the one applicable to the other.

84. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearance, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were

to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures.

85. The fixed system of runs and clearances which involved a cooperative arrangement among the defendants, was also designed to protect their theatre holdings, safeguard the revenue therefrom, and eliminate competition. The major defendants' predominant position in first-run theatre holdings was strongly protected by a fixed system of clearances and runs. The power to fix clearances and runs which existed and was exercised by the major defendants was in itself a power to exclude independents who were competitors, and was accompanied by actual exclusion.

85(a). This system gave the defendants a practical control over the run and clearance status of any given theatre. It involved discrimination against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by building or improving theatres while the major defendants possessed superior advantages. Therefore, though the evidence was insufficient to prove that there was discrimination in negotiation for clearances and runs theatre by theatre, because it was well-nigh impossible to establish that a particular clearance or run was not refused because of the inadequacy of the applicant's theatre, the system of clearances and runs was such as to make competition against the defendants practically impossible, and there was discrimination in particular instances.

86. Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the feature in their several areas, seriously and unreasonably restrain competition.

87. Loew's is not, and never has been, a party either as a distributor or as an exhibitor, to any "formula deal" license agreements.

88. Master agreements which cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best and leaves other terms to the circuit's discretion, have been entered into by the distributor-defendants and unreasonably restrain trade.

89. Franchises have been entered into by the distributor-defendants with affiliated and non-affiliated circuits which unreasonably restricted the opportunities of small exhibitors to license films in competition with the theatres of such circuits by tying up the films released for long periods of time. None of the major defendants has entered into any franchises since November, 1940, and they have none in existence in 1950.

90. Loew's today has outstanding no franchise agreements for any theatre in which it does not have an interest, and Loew's is not currently granting franchises. During its entire history Loew's, as a distributor, granted a total of 213 franchises, of which 154 were to independent theatres and only 59 to those in which any other producer-exhibitor had an interest.

91. Twentieth Century-Fox has not granted any franchises since June 6, 1940. In 1938-39, the motion picture season in which Twentieth Century-Fox had the greatest number of franchises outstanding, there were 400. Of these, 361 were with independent exhibitors.

92. During the period in question Universal entered into franchise agreements with 727 independent exhibitors and 43 affiliated exhibitors.

93. Block-booking, when the license of any feature is conditioned upon taking of other features, is a system

which prevents competitors from bidding for single features on their individual merits.

94. For many years the distributor-defendants, except United Artists Corporation, licensed their films in "blocks" or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot, and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block booking and blind-selling based upon the supposed unfairness of contracts which often includes pictures the inferior quality of which could not be known, Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five, however, could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consenting distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

95. United Artists did not at any time license the exhibition of its pictures in blocks but on the contrary licensed the exhibition of its pictures separately and individually.

96. During the period in question United Artists did not condition the licensing of any photoplay in any exhibitor's theatre upon that exhibitor's agreement to license other United photoplays for exhibition in said theatre.

97. Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it.

98. Since the consent decree of November 20, 1940, the five major defendants have given each exhibitor, whether a defendant or independent, an opportunity at trade shows to view each feature before licensing it. In general, trade shows, which are designed to prevent blind-selling, are poorly attended by exhibitors.

99. During the 1943-44 season, the number of features distributed by eight distributor defendants and the three other national distributors were as follows:

			Percentages of Total	
Distributor-defendants:		Number of Films	With "Westerns" included	With "Westerns" excluded
Fox		33	8.31	9.85
Loew's		33	8.31	9.85
Paramount		31	7.81	9.25
RKO		38	9.57	11.34
Warner		19	4.79	5.67
Columbia		41	10.32	12.24
United Artists		16	4.04	4.78
Universal		49	12.34	14.63
Sub-total		260		
Other National Distributors:				
Republic:				
20 features				
30 "Westerns"			14.86	8.66
Monogram:				
26 features				
16 "Westerns"			10.58	7.76
RKO:				
20 features				
16 "Westerns"			9.07	5.97
			100.	100.
Sub-total,	137	397		
Total without "Westerns"		335		

100. The approximate total domestic film rental for the features listed in Finding 99 is as follows:

		Percent of Total
Fox	$ 50,300,000	18
Loew	54,700,000	20
Paramount	41,100,000	15
RKO	28,500,000	10
Warner	29,400,000	10
Columbia	19,600,000	7
United Artists	14,400,000	5
Universal	26,300,000	9
Republic	7,700,000	3
Monogram	4,500,000	2
PRC	1,900,000	1
Total	$278,400,000	100

101. Continuously since its organization RKO has distributed features for independent producers. The particular independent producers whose features have been distributed by RKO have varied from time to time. In the nine seasons ending 1943-44, 19.8% of the features distributed by RKO were independently produced, and 28.4% of RKO's gross receipts from domestic licenses of features was derived from such independently produced features.

102. It would be financially impossible for RKO to operate its theatres on features distributed by RKO alone.

103. Twentieth Century-Fox produced less than 9 percent of the total number of features nationally distributed in the United States during each year between 1936-37 and 1944-45.

104. Universal has customarily produced at its studios at Universal City, California, during each theatrical year (commencing on or about September 1st) between 45 and 50 feature-length motion picture photoplays, seven so-called Westerns, four Serials, 15 two-reel subjects, 30 single-reel subjects, and 104 newsreels.

105. Said motion pictures were distributed by Universal and licensed for exhibition by motion picture theatres

throughout the United States by means of a system of 31 exchanges located in various States in the United States, from the East Coast to the West Coast and from Canada to the Southern boundary. Universal also maintained a Home Office in the City of New York.

106. In marketing its motion pictures, Universal's usual and customary practice was to offer to license to exhibitors, by title and description as aforesaid, its entire line of pictures, consisting of feature-length motion picture photoplays, Westerns, short-subjects (consisting of serials and two-reel and one-reel pictures) and newsreels. In this way approximately 50 feature-length motion picture photoplays, and group of Westerns, short-subjects, two so-called "Special" photoplays, three features produced by independent producers, and newsreels, were offered to exhibitors by Universal each year.

106(a). During recent years, in exces of 600 feature-length motion picture photoplays were released each year in the United States, exclusive of foreign-made films. Universal releases of feature-length photoplays, including Westerns and so-called Marques pictures, during said period, equal approximately 8% of the total number of feature-length photoplays released in the United States each year.

107. During the period in question, United Artists Corporation distributed between 20 to 26 pictures a year when the corporation had a good year and has handled as low as 4 in distribution in a releasing season.

108. At no time during the period in question did United Artists distribute more than 5% of the feature photoplays American made and distributed in the United States of America and generally distributed less than 5% of such releases.

109. That in each distribution agreement with each producer using the facilities of United Artists for distribution

among other things there appears substantially the following language:

> United agrees to devote its best efforts to the proper marketing and disposition of the motion pictures delivered hereunder in all the territories licensed hereunder wherein it customarily markets motion pictures, and to make such marketing as complete and efficient as practicable, so that the gross returns from the marketing of the product hereunder shall be as large as possible and at the same time consistent with the sound business policy of United.
>
> United will use its best efforts to procure prices, license fees and rentals in a fair and open market reasonably satisfactory to the Producer.
>
> Exhibition Contracts: The exhibition contracts for each of such motion pictures delivered hereunder shall be made separate and apart from the exhibition contract of any other motion picture marketed by United, with the exception that in territories other than the United States where it is customary to include more than one motion picture on a contract, the Producer authorizes United to market its product in accordance with that custom. In no event, however, shall any motion picture of the Producer be used to enforce the licensing, leasing or other disposition of any other motion picture marketed by United, and in such territory where it is the custom to include on one contract more than one motion picture United shall set out the respective license fees for each motion picture after the name of such motion picture.
>
> United agrees upon the written direction of Producer that United shall market wherever permissible the motion pictures designated by the Producer or its agent as a unit, and in such case such unit shall be licensed separate and apart from any other motion picture marketed by United, with the exception that in those countries where it is the custom to market all of the motion pictures on one contract, United shall adhere to the prevailing custom.
>
> The producer shall have the right to designate a representative for the territories hereinafter specified. The Producer shall bear all the expenses of such representative. Such representative must have an office in the central location of such territory, and if so

United shall submit to such representative for his approval or rejection all proposed written contracts with exhibitors for that territory. The territories and their central location are as follows:

Territory	Central Location
United States and Canada	New York
British Isles	London
Australia	Sydney

Producer agrees that such admission shall not be necessary if made impractical by conditions beyond the control of United, such as conditions arising out of war.

If Producer has designated such a representative for any such territory, United shall submit for his approval or rejection each proposed written contract for the distributing, exhibiting, or marketing of such Producer's motion pictures or any of them in the territory in which such representative is acting. No such contract shall be accepted by United if within three (3) succeeding business days following the date on which said proposed written contract has been received by the Producer or its representative the Producer or its representative the Producer or its representative shall return such proposed contract to United with its rejection noted thereon or appended thereto.

Should the Producer or its representative reject any such proposed contract the Producer or its representative shall have fourteen (14) days from the date of rejection in which to obtain a more favorable contract. Should the Producer or its representative fail so to do the original contract shall ipso facto be deemed approved unless the Producer or its representative shall have designated its original rejection as final. No proposed contract on which the rejection has been designated as final shall be entered into by United.

Should the Producer or its representative at any time agree in advance with United upon the rental terms or license fees for the distribution, exhibition, or marketing of any motion picture in any specified theatre or situation, United shall not be obligated to submit the contract containing the terms so agreed upon to the Producer or its representative for approval.

110. Various contract provisions by which discriminations against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits were accomplished are: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting move overs and extended runs; granting road show privileges; allowing overage and underage; granting unlimited playing time; excluding foreign pictures and those of independent producers; granting rights to question the classification of features for rental purposes. These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. The competitive advantages of these provisions are so great that their inclusion in contract with the larger circuits constitutes an unreasonable discrimination against small competitors.

111. The discriminations referred to in Finding 110 can be enjoined but there is no effective way of preventing similar results from the use of other discriminatory devices in the absence of divorcement relief.

112. Agreements were made by the exhibitor-defendants with each other and their affiliates by which given theatres of two or more exhibitors, normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors, and by which profits of the "pooled" theatres were divided among the exhibitors in or owners of such theatres according to pre-agreed percentages or otherwise. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for

inclusion in the "pool". The result is to eliminate competition pro tanto both in exhibition and in distribution of features which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

113. Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool".

114. In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres. This is but another means of carrying out the restraints found above.

115. Many theatres, or the corporations owning them, have been held jointly by one or more of the exhibitor-defendants together with another exhibitor-defendant. These joint interests have enabled the major defendants to operate theatres collectively rather than competitively. When one of the major defendants has owned an interest of five per cent or less, such an interest was *de minimis* and was only to be treated as an inconsequential investment in exhibition. A summary of theatres jointly owned by two defendants is set forth in the following tabulation taken from RKO's Exhibit 11:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	214 Theatres

The major defendants have, since the remand of this case, entered into orders and stipulations providing for the dissolution of all such joint interests still held by them, except those which were *de minimis*.

116. The interest of Newman in Evergreen State Amusement Corporation was that of an investor.

117. Many theatres, or the corporations owning them, have been held jointly by one or more of the exhibitor-defendants with independents. A summary of such theatres is set forth in the following tabulation taken from RKO's Exhibit 11:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21
Total	1,287

Some involved no more than innocent investments by those who were not actual or potential theatre operators. Others involved an alliance with one who was or would have been an operator but for the joint ownership, thereby eliminating putative competition. When a defendant or an independent has owned an interest of five per cent or less, such an interest was *de minimis* and was only to be treated as an inconsequential investment in exhibition. Of the theatres listed above, 177 theatres in which Paramount had an interest and 32 in which RKO had one were *de minimis*. The dissolution of all joint interests with a present or potential operator has been provided for in orders and stipulations entered into by the major defendants since the remand of this case.

118. In the year 1945 there were about 18,076 motion picture theatres in the United States, of which the five major defendants had interests in 3,137 or 17.35 percent. Of the latter, Paramount or its subsidiaries owned inde-

pendently of the other defendants 1,395—a little less than half, or about 7.72 percent; Warner 501, or about 2.77 percent; Loew's 135, or about .74 percent; Fox 636, or about 3.52 percent; and RKO 109, or about .60 percent. There were 361 theatres, or about 2.00 percent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owned an indirect minority stock interest. It includes all theatres in which each defendant otherwise owned a direct or indirect interest of any amount.

119. Former Finding 119 has been vacated.

120. On January 1, 1935, Loew's operated in the United States 126 theatres. The first-run theatres, which are engaged to a large extent in exhibiting Loew's own product, Metro pictures, serve as "show cases" for those pictures in the areas where the theatres are located.

121. The formation of RKO resulted in the conversion of vaudeville theatres acquired by it into motion picture theatres and thereby introduced new and substantial competition into the exhibition field in the cities in which each of these theatres was located, except insofar as such competition was affected by the practices of the defendants.

122. Ownership and operation by RKO of theatres in certain principal cities of the United States enables RKO through the utilization of the facilities of such theatres to plan and direct the first exploitation of the features which it distributes in such areas in a more effective manner than is possible in areas where RKO does not operate theatres.

123. The successful exhibition of a feature in its initial runs in any area is widely publicized and closely observed by subsequent run exhibitors in that area and success in

exploiting a picture in such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors.

124. Each of the five major defendants is able to coordinate the initial exhibition of its features in its theatres with an extensive and accurately timed national advertising campaign.

125. Twentieth Century-Fox is interested in theatres in only 16 of the 92 cities having a population of over 100,000. In 12 of these 16 cities features of one or more defendants are licensed to independent first run exhibitors competing with Twentieth Century-Fox [New York, Seattle, Denver, Portland, Oakland, San Diego, Long Beach, Los Angeles, San Francisco, Spokane, Sacramento, and Kansas City, Kansas] as well as to other defendants having theatres in some of these cities. In three of the remaining four cities, features of one or more defendants are licensed on first run to other defendants.

126. The 17.35% of theatres which comprise the five circuits of the major defendants pay from 35 to 54% of the total domestic film rental, respectively, received by the eight distributor defendants and 45% of the total domestic film rental received by all of said distributor-defendants. The five largest unaffiliated circuits together pay less than 5% of such rental.

127. The major defendants, as distributors, during the 1943-44 season, received from 71 to 81% of the film rental that was paid to all distributors by exhibitors affiliated with the five major defendants. The minor defendants received from 26 to 15% of such rental and the independent distributors from 2½ to 4½% of such rental.

128. During the 1943-44 season the eight distributor defendants received 45.2 of the total feature film rental received by them from theatres affiliated with the five major defendants; and 54.8% of such rental from other exhibitors.

129. In some situations where Paramount had theatre interests, other defendant distributors licensed their features to competing theatres and not to the Paramount theatres, and in some cases the operating companies in which Paramount was interested were not able to obtain the right to exhibit the feature of some of the other defendant distributors.

130. Paramount features are licensed for exhibition in from 8,000 to 14,500 theatres in the United States annually. The number of licenses each year varies from feature to feature and from year to year.

131. In 21 of the 36 out of the 92 cities where Loew's operates theatres none of the other four producer-exhibitors licensed its features in the 1943-44 season for first-run exhibition in a Loew's theatre, to the extent of more than three features, the Loew's theatres' first-run exhibition being otherwise limited to its own features and those of non-theatre-owning producers.

132. Over the 10 years from 1935 to 1945, the total number of features licensed by the other four theatre-owning distributors to Liew's first-run houses, decreased from 1,382 to 998 and the features of non-theatre-owning distributors increased from 1,201 to 1,879.

133. In 1935, the other four theatre-owning distributors earned $2,611,986 from Loew's theatres and the non-theatre-owning distributors earned $2,205,330 [$406,656 less]. In 1944, the non-theatre-owning distributors earned $5,261,116 in Loew's theatres, which was $419,477 more than the $4,841,639, earned in Loew's theatres in that year by the four other theatre-owning distributors.

134. In 1944, the percentage of the total film rental paid by Loew's theatres to each of the non-theatre-owning distributors, Columbia [8.8%], United Artists [8.3%] and Universal [7.4%], was higher than that paid to each of three producer-exhibitors, RKO [2.1%], Warner Bros. [2.1%] and Twentieth Century-Fox [6.1%].

135. In the year 1944, of the total film rental paid by Loew's theatres, 47.9% was to Loew's itself for the exhibition of Loew's pictures, and 27.1% was to non-theatre-owning distributors. Thus a total of 75% of all film rentals paid by Loew's theatres went to persons other than the four other defendant-producer-exhibitors.

136. During the 1943-44 season RKO received 56.9% of its total license fees from independent theatres, 14.1% from its own theatres, and [in the aggregate] 29% from theatres affiliated with other defendants.

137. In the 1943-44 season, of the total number of exhibitions of features in first-run and metropolitan second-run-theatres operated by RKO, 23.1% were exhibitions of features distributed by RKO, 29.6% were exhibitions of features distributed by other theatre-owning distributors, and 47.3% were exhibitors of features distributed by non-theatre-owning distributors. In the same season the respective percentages of the feature film rentals paid by RKO were 30.6 to RKO, 43.7 to other theatre-owning defendants, and 23.7 to non-theatre-owning distributors.

138. In the 4 pre-war seasons of 1937-1940, Warner derived about 61-6/10% of its domestic gross rentals from theatres not affiliated with any of the defendants, about 14% from theatres in which it had an interest, about 13% from theatres in which Paramount had an interest, about 4% from theatres in which Twentieth Century-Fox had an interest, about 6% from theatres in which RKO had an interest, and less than 1% from theatres in which Loew had an interest.

139. Of its total domestic and foreign rentals Warner received about 30% from abroad, about 43% from theatres in which none of the defendants had an interest, about 10% from Warner's own American theatres, and the balance, about 16%, from American theatres in which one or more of the defendants had an interest.

140. Not a single one of the Loew first run theatres in the 39 of the 92 largest cities where Loew operates or has an interest in first run theatres licensed a Warner feature for exhibition in the 1943-44 season. In the same season the Warner theatres regularly exhibited the Loew features in many of the 28 of the 92 largest cities where Warner operated or had an interest in first run theatres.

141. The dollars paid by Warner to each of the other defendants and by each of the other defendants to Warner show no uniformity of pattern from company to company from year to year.

142. There were marked variances from year to year in the sums paid as rental by the theatres in which Warner had an interest to United Artists, Universal, and Columbia, the non-theatre owning defendants.

143. Between 1937 and 1944 the theatres in which Warner had an interest substantially decreased the amount of film rental paid to the 5 theatre owning defendants, and substantially increased film rental paid to the non-theatre owning defendants.

143(a). During the 9 prewar years of 1933-1941, the average cost of American made Warner features rose from $241,000 in 1933 to $448,000 in 1940. By 1945 the average cost had risen to $1,371,000.

143(b). In the past the foreign business of Warner has been exceedingly profitable.

143(c). With the cessation of the war the foreign market for Warner pictures are being severely restricted.

144. Of the total film revenue received by Twentieth Century-Fox in 1944 from all theatres in the United States, 60.8 percent was paid by exhibitors not defendants in this action; 14.1 percent was paid by its own theatres; 1.26 percent by Loew theatres; 5.52 percent by RKO theatres; 13.46 percent by theatres in which Paramount had an interest; and 4.82 percent by Warner theatres.

145. On January 1, 1935, there were 13,386 theatres operating in the United States. In 1945, there were 18,076 theatres operating in the United States.

146. In about 60% of the 92 cities having population over 100,000 there are independent first run theatres.

147. In about 91 percent of the 92 cities with over 100,000 population there are first run theatres of more than one defendant or of a defendant and independents.

147(a). All the defendants entered into a horizontal conspiracy to fix prices, runs and clearances which was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integration an active aid to the conspiracy. Vertical integration has furnished an incentive for such conspiracy.

147(b). There is close relationship between the vertical integrations and the illegal practices. The vertical integrations were a means of carrying out the restraints and conspiracies.

147(c). The interdependency of defendants to obtain pictures for their theatres, on the one hand, and on the other, to obtain theatre outlets for their pictures has lessened competition among defendants and between them and independents.

147(d). There is substantial proof that monopoly power existed among the eight distributor-defendants who were all working together. Considering that the vertical integrations aided the horizontal conspiracy mentioned in Finding 147(a) at every point, the defendants must be viewed collectively rather than independently as to the power which they exercised over the market by major defendant's theatre holdings.

147(e). Viewed collectively the major defendants owned in 1945 at least 70 percent of the first run theatres in the 92 largest cities.

148. In the aforementioned 92 cities, at least 70% of all the first run theatres are affiliated with one or more of the major defendants. In 4 of said cities there are no affiliated theatres. In 38 of said cities there are no independent first run theatres. In the remaining 50 cities the degree of first run competition varies from the most predominantly affiliated first run situations, such as Boston, Chicago, Los Angeles, Philadelphia, St. Paul, and Washington, D. C., in each of which the independent first run theatres played less than eleven of the defendants' features on first run during the 1943-44 season, to the most predominantly independent first run situations, such as Nashville, Louisville, Indianapolis, and St. Louis, where the affiliated first run theatres played at least 31 of the defendants' pictures on first run during that season. In none of the said 50 cities did less than three of the distributor-defendants license their product on first run to the affiliated. In 19 of said 50 cities less than three defendant-distributors licensed their product on first run to independent theatres. In a majority of said 50 cities the major share of all of the defendants' features were licensed for first run exhibition in theatres affiliated with the major defendants.

148(a). Viewed collectively the major defendants owned 60 percent of the first run theatres in cities with populations between 25,000 and 100,000. In addition, in approximately 238 towns involving in all all but about 17 cases populations of less than 25,000 but having two or more theatres, some single one of the five major defendants, or in about 18 cases two of the defendants, had all the theatres and therefore possessed a complete local monopoly in exhibition.

148(c). The film distribution in the 1943-44 season shows that one or more of the five major defendants exhibited on first run substantially all of the feature films distributed by the five major defendants in about 43 of the 92 cities of over 100 thousand, and substantially all of the feature films distributed by the eight defendants in about 143 of the 320

cities of 25,000 to 100,000. [See Government Exhibits 489, 490, 490A.]

148(d). As distributors, the five major defendants viewed collectively, received approximately 73 percent and the three minor defendants 21% of the domestic film rentals from the films, except Westerns, distributed in the 1943-44 season.

148(e). The percentages of first run theatre ownership and domestic film rentals controlled by the major defendants when coupled with the strategic advantages of vertical integration created a power to exclude competition from the distribution and exhibition markets when desired.

148(f). This power might be exercised either against nonaffiliated exhibitors or distributors, for the ownership of what was generally the best first run theatres coupled with the possession by the defendants of the best pictures, enabled them substantially to control the market in first-run pictures.

148(g). There is substantial proof that the intent to exercise the monopoly power existed among the defendants.

149. Loew's operates first-run theatres in 36 of the 92 cities in the United States with more than 100,000 population; in every one of these 36 cities, there are other "first-run" theatres exhibiting the features of one or more of the other defendant distributors; in 21 of these 36, one or more of the other first-run theatres are operated by independents.

150. Of the 92 cities in the United States having a population in excess of 100,000, Twentieth Century-Fox is interested in first run theatres in 16 and licenses its features to them. In 4 of the remaining cities, none of the defendants has theatre interests. This leaves 72 cities in which there are first run theatres operated by defendants other than Twentieth Century-Fox. In 23 of the 72 cities, Twentieth Century-Fox licenses its features to independent exhibitors.

151. Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor.

152. The major defendants aided each other in attaining a monopoly of exhibition and in restricting competition by refraining from having theatre interests in many areas where one of them had theatres.

153. In cities of less than 100,000 in population, Paramount, Warner, Fox and RKO owned or operated theatres either in largely separate market areas or in pools, without more than trifling competition among themselves or with Loew's. In cities having a population of more than 100,000, there was in general little competition among the major defendants, although considerably more than in towns of under 100,000.

153(a). In cities of less than 100,000, Paramount had complete or partial interests in or pooling agreements* with other defendants affecting 1,236 theatres located in 494 towns. In 13 of these towns containing 31 of the theatres—only 3%—were theatres of another defendant. In 9% of these towns competition between Paramount and the only other defendant in the town was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres; and in this 9% were located 10% of Paramount's theatre interests. And in 88% of the towns, containing 87% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus it appears that there was little, if any, theatre competition between Paramount and any other defendant in 97% of the towns of under 100,000 and in respect to 97% of the theatres in which Paramount had an interest.

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* Pooling agreements and joint interests among defendants are treated in Findings 153-153(g) and 154-154(h) as indistinguishable for the purpose of summarizing geographical distribution.

153(b). Fox had similar theatre interests in 428 theatres located in 177 towns. In 13 of these towns containing 29 Fox theatres, or about 7% thereof, there were theatres of another defendant. In about 93% of the towns containing the same percentage of Fox's theatre interests, Fox was the only defendant operating theatres; in 22 of these towns there was but one theatre and a population capable of supporting only one theatre.

153(c). Warner had similar theatre interests in 306 theatres located in155 towns of less than 100,000. In 17 towns, or 11%, containing 30 Warner theatres, or 10% of its holdings, there were theatres of another major defendant. In 3% of the towns, competition between Warner and the only other defendant in the town was substantially lessened or eliminated by means of pooling agreements; and in this 3% were located 4% of Warner's theatre interests. In 86% of the towns containing the same percentage of Warner's theatre interests, Warner was the only defendant operating theatres. Thus, there appears to have been little, if any, theatre competition between Warner and any other defendant in 89% of the towns and in respect to 90% of the theatres in which Warner had an interest. In 33 of these towns there was but one theatre and a population capable of supporting only one theatre.

153(d). Loew had interests in only 17 theatres located in 14 towns. In 4 towns containing 4 Lowe theatres, there were theatres of another defendant. In 2 of the towns, competition was substantially lessened or eliminated by means of joint interests; and in these 2 were located 3 of Lowe's theatre interests. In 8 of the towns, containing 10 Loew's theatre interests, Loew was the only defendant operating theatres. Thus, there appears to have been little, if any, theatre competition between Loew and any other defendant in 10 of the towns and in respect to 13 of the theatres in which Loew had an interest.

153(e). RKO had interests in 150 theatres located in 66 towns. In 6 towns, or 10%, containing 6 RKO theatres, or

4%, there was competition with another major defendant. In 60% of the towns, competition was substantially lessened or eliminated by means of pooling agreements, and in this 60% were located 73% of RKO's theatre interests. In 30% of the towns, containing 23% of RKO's theatre interests, RKO was the only defendant operating theatres. Thus, there appears to have been little, if any, competition between RKO and any other defendant in 90% of the towns and in respect to 96% of the theatres in which RKO had an interest.

153(f). The major defendants had interests altogether in 2,020 theatres located in 834 towns. In 26 towns, or 3% containing 100 of their theatres, or 5%, there was competition among some of them. In somewhat over 5% of the towns, competition between them was substantially lessened or eliminated by means of pooling agreements, and in this 5% were located 7% of their theatre interests. And in somewhat less than 92% of the towns, containing 88% of their theatre interests, only one of the major defendants owned theatres in the area. Thus, there appears to have been little, if any, competition among the five defendants or any of them in 97% of the towns and in respect to 95% of the theatres in which they had an interest.

153(g). The effect of the geographical distribution in towns having a population of less than 100,000 was largely to eliminate competition among all of the defendants in the areas where any of them had theatres. The statistics upon which these findings are based are contained in the appendix to this Court's opinion of July 25, 1949.

154. In cities of over 100,000 Paramount had complete or partial interests in or pooling agreements with other defendants affecting 352 theatres in 49 cities. In 18 of these cities, or 37%, containing 91 Paramount theatres, or 26%, there were theatres of other defendants. In an additional 10% of the cities, containing 17% of Paramount's theatre holdings, there were other defendants having theatre in-

terests, but those interests were so relatively small as compared with Paramount, both on first and later runs, that competition with Paramount was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 12% of these cities competition between Paramount and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 12% were located 18% of Paramount's theatre interest. And in 41% of the cities, containing 39% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus, it appears that there was little, if any, theatre competition between Paramount and any other defendant in 63% of the cities of over 100,000 and in respect to 74% of the theatres in which Paramount had an interest.

154(a). Fox had similar theatre interests in 211 theatres located in 17 cities. In 5 of these cities, or 29%, containing 54 Fox theatres, or 26%, there were theatres of other defendants. In an additional 18% of the cities, containing 41% of Fox's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Fox, both on first and later runs, that competition with Fox was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 53% of the cities, containing 33% of Fox's theatre interests, Fox was the only defendant operating theatres. Thus, it appears that there was little, if any, theatre competition between Fox and any other defendant in 71% of the cities and in respect to 74% of the theatres in which Fox had an interest.

154(b). Warner had similar theatre interests in 243 theatres located in 26 cities. In 14 of those cities, or 54% containing 89 theatres, or 37%, there were theatres of other defendants. In an additional 8% of the cities, containing 5% of Warner's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Warner, both on first

and later runs, that competition with Warner was unsubstantial owning to the dominance which the latter's theatre holdings gave it. In 19% of these cities competition between Warner and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 19% were located 51% of Warner's theatre interests. And in 19% of the cities, containing 7% of Warner's theatre interests, Warner was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Warner and any other defendant in 46% of the cities and in respect to 63% of the theatres in which Warner had an interest.

154(c). Loew had similar theatre interests in 144 theatres located in 37 cities. In 32 of those cities, or 86%, containing 122 Loew theatres, or 85%, there were theatres of other defendants. In 3% of these cities, competition between Loew and the only other defendant in the city was eliminated by means of a pooling agreement affecting all of their theatres, and in this 3% were located 7% of Loew's theatre interest. And in 11% of the cities, containing 8% of Loew's theatre interests, Loew was the only defendant operating theatres. Thus, it appears that there was little, if any, theatre competition between Loew and any other defendant in 14% of the cities and respect to the 15% of the theatres in which Loew had an interest.

154(d). In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. On one occasion where Paramount was having a long dispute with Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrange-

ment, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner and half of Universal. Accordingly, the showing that 85% of Loew's theatres are in competition with theatres of other defendants is misleading and may properly be reduced by the exclusion of its New York neighborhood theatres. If this is done it would give Loew a percentage of approximately 42% of its theatres in competition with other defendants in cities over 100,000.

154(e). RKO had similar theatre interests in 256 theatres in 31 cities. In 22 of these cities, or 72%, containing 190 theatres, or 74%, there were theatres of other defendants. In an additional 6% of the cities, containing 4% of RKO's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with RKO, both on first and later runs, that competition with RKO was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 16% of these cities, competition between RKO and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 16% were located 15% of RKO's theatre interests. And 6% of the cities, containing 7% of RKO's theatre interests, RKO was the only defendant operating theatres. Thus, it appears that there was little, if any, theatre competition between RKO and other defendants in 28% of the cities and in respect to 26% of the theatres in which RKO had an interest.

154(f). Approximately 58% of RKO theatre interests were located in New York on neighborhood runs, and the same comments as to distribution of film made in regard to Loew's are applicable to RKO. If its New York neighborhood theatre interests were excluded from the category of theatres in competition with other defendants, the RKO percentage would then be only about 16% in competition with other defendants.

154(g). The major defendants had interests altogether in 1,112 theatres located in 87 cities of more than 100,000. In 46% of these cities, containing 23% of their theatre interests, only one of the major defendants owned theatres in the area. In 11.5% of the cities, competition between them was substantially lessened or eliminated by means of pooling agreements, and in this 11.5% were located 16% of their theatre holdings. In an additional 11.5% of the cities, containing 17% of their theatre interests, there was more than one defendant having theatre interests in the city, but the position of one defendant was so dominant relative to the others that competition between them was unsubstantial. In 31% of the cities, containing 44% of their theatre interests, there was competition among the defendants. But the New York neighborhood theatres of Loew and RKO, which are included in reaching the 44% figure, should properly be excluded because there is no competition between Loew and RKO in obtaining pictures for the reasons we have already given. This would reduce the percentage of defendants' theatres which compete with one another to 27.

154(h). The effect of the geographical distribution in cities having a population of more than 100,000 was substantially to limit competition among the major defendants.

155. Although there was no agreement to divide territory geographically in the original organization of the defendants' theatre circuits, the geographical distribution of theatres among the major defendants became a part of a system in which competition was largely absent and the status of which was intentionally maintained by fixed runs, clearances and prices, by pooling agreements and joint ownerships among the major defendants, and by cross-licensing which made it necessary that they should work together.

156. In the relatively few areas where more than one of the major defendants had theatres, competition for first-run licensing privileges was generally absent because the

defendants customarily adhered to a set method in the distribution and playing of their films.

156(a). A study of four seasons between the years 1936 and 1944 shows that during this period the privilege of first-run exhibition of a defendant's films was ordinarily transferred from one defendant to another only as the result of dissolution of a theatre operating pool or an arbitrary division of the product known as a "split".

156(b). Effective relief from the monopoly power of and its exercise by the major defendants cannot be obtained without divorcement. No adequate competition among the defendants or between defendants and independents can exist in the presence of interdependency among the defendants on the one hand to obtain pictures for their own theatres and on the other to obtain theatre outlets for their own pictures. Divorcement is necessary to prevent the major defendants from being in a state of interdependence which too greatly restricts competition. Divorcement is a necessary remedy to introduce competition into defendants' system of fixed admission prices, clearances and runs, and to remove a major incentive to discriminatory trade practices.

157. The arbitration system and the Appeal Board which has been a part of it have been useful in the past and should be continued upon terms to be settled by the Court.

158. Evidence submitted since the remand of this case has been considered by this Court. Such evidence has been used by the Court in making its findings as to the situation in 1945. The change in status and practices since 1945 revealed by this evidence has been in sufficient to warrant a change in the findings and judgment entered herein.

159. A consent judgment was entered on March 3, 1949, against defendants Paramount Pictures Inc. and Paramount Film Distributing Corporation, and neither of these companies nor their counsel appeared or participated in

any of the proceedings after the entry of that consent judgment, except that, on April 21, 1949, counsel for these companies presented, and the court made and directed the entry of, an order severing and terminating, as of March 3, 1949, this action as against said defendants.

160. A consent judgment was entered on November 8, 1948, against defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation, and none of these companies nor their counsel appeared or participated in any of the proceedings after the entry of that consent judgment, except that on January 18, 1950, counsel for these companies presented, and the court made and directed the entry of, an order styled United States v. Radio-Keith-Orpheum Corporation, et al. severing and terminating, as of November 8, 1948, this action as against said defendants.

Conclusions of Law

1. The Court has jurisdiction of this cause under the provisions of the act of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", hereinafter referred to as the Sherman Act.

2. Universal Pictures Company, Inc. and Screen Gems, Inc. have not violated the Sherman Act and should be dismissed as defendants herein.

3. None of the defendants herein has violated the Sherman Act by monopolizing or attempting to monopolize the production of motion picture films.

4. The consent decree entered herein on November 20, 1940 does not foreclose enforcement in this suit at this time of any rights or remedies which the plaintiff may have against any of the defendants by virtue of violations of the Sherman Act by them, except such acts as were in accord with such decree during the period it was in force.

5. None of the defendants herein has violated the Sherman Act by combining, conspiring or contracting to restrain trade in any part of the business of producing motion pictures or by monopolizing, attempting to monopolize, or conspiring to monopolize such business.

6. The defendants, and each of them are entitled to judgment dismissing all claims of the plaintiff based upon their acts as producers, whether as individuals or in conjunction with others.

7. The defendants Loew's Incorporated; Warner Bros. Pictures Inc.; Warner Bros. Pictures Distributing Corporation, (formerly known as Vitagraph, Inc.); Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Acquiescing in the establishment of a price fixing system by conspiring with one another and with Paramount and RKO to maintain theatre admission prices;

(b) By conspiring with one another and with Paramount and RKO to restrict competition for theatre patronage with each other and with independents through a system of admission price fixing;

(c) Conspiring with each other and with Paramount and RKO to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area;

(d) Fixing, together with Paramount and RKO, a system of runs and clearances which prevented effective competition by outsiders and which was designed to protect the theatre holdings of the major defendants and to safeguard the revenue therefrom.

8. The distributor-defendants Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.); Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act, by:

(a) Conspiring with each other and with Paramount and RKO to maintain a nation-wide system of fixed minimum motion picture theatre admission prices;

(b) Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices;

(c) Conspiring with each other and with Paramount and RKO to maintain a nation-wide system of runs and clearances which is substantially uniform as to each local competitive area;

(d) Agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in Finding 110 above;

(e) Agreeing individually with such licensees to grant unreasonable clearance against theatres operated by their competitors;

(f) Making master agreements and franchises with such licensees;

(g) Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation;

9. The exhibitor-defendant Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation, have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures both before and after the entry of said consent decree in violation of the Sherman Act by:

(a) Jointly operating motion picture theatres with each other, with Paramount and RKO, and with independents through operating agreements or profit-sharing leases;

(b) Jointly owning motion picture theatres with each other, with Paramount and RKO, and with independents through stock interests in theatre buildings;

(c) Conspiring with each other, with the distributor-defendants named in Paragraph 8 above, and with Paramount and RKO, to fix substantially uniform minimum motion picture theatre admission prices, runs, and clearances;

(d) Conspiring with the distributor-defendants named in Paragraph 8 above and with Paramount and RKO to discriminate against independent competitors in fixing minimum admission price, run, clearance, and other license terms.

10. The formula deals, master agreements and franchises referred to in Finding 86, 88, and 89 have tended to restrain trade and violate Section 1 of the Sherman Act.

11. Block-booking, as herinabove defined, violates the Sherman Act.

12. As an aid to the conspiracy to fix prices, runs, and clearances hereinabove described, and as a means for carrying out such conspiracy, the maintenance of vertical integration by the major defendants named in Paragraph 7 above has violated the Sherman Act and effected a situation where the creation of competition requires dissolution of these vertical integrations.

13. The collective monopoly power of the defendants named in Paragraph 7 above (taken together with Paramount and RKO) to exclude competitors from first run coupled with their intent to exercise this power violated Section 2 of the Sherman Act.

14. Their use of this power to actually exclude independents from the first run market and to restrict the distribution of pictures to independents violated Sections 1 and 2 of the Sherman Act.

15. The power of the defendants named in Paragraph 7 above to fix runs and clearances when exercised by the major defendants named in Paragraph 7 above to exclude independent competitors violated the Sherman Act.

16. Loew's Incorporated, has violated the Sherman Act by conspiring with RKO to monopolize and monopolizing the first neighborhood run in New York City, and by the dividing of that market between itself and RKO.

17. Further conclusions of law are made and embodied in the decree filed herewith.

Dated: February 8, 1950.

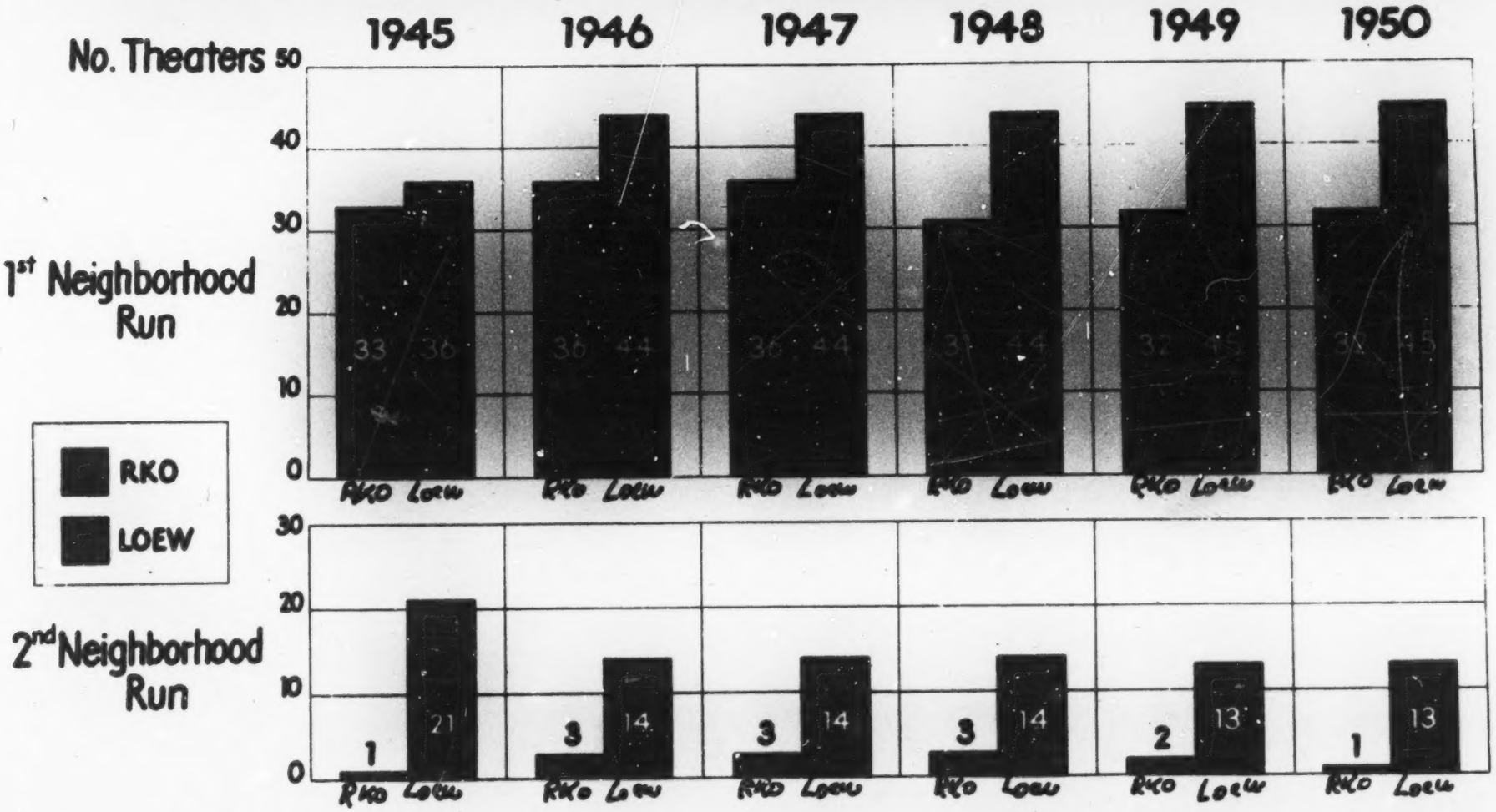
AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

ALFRED C. COXE,
United States District Judge.

PLAINTIFF'S EXHIBIT 5

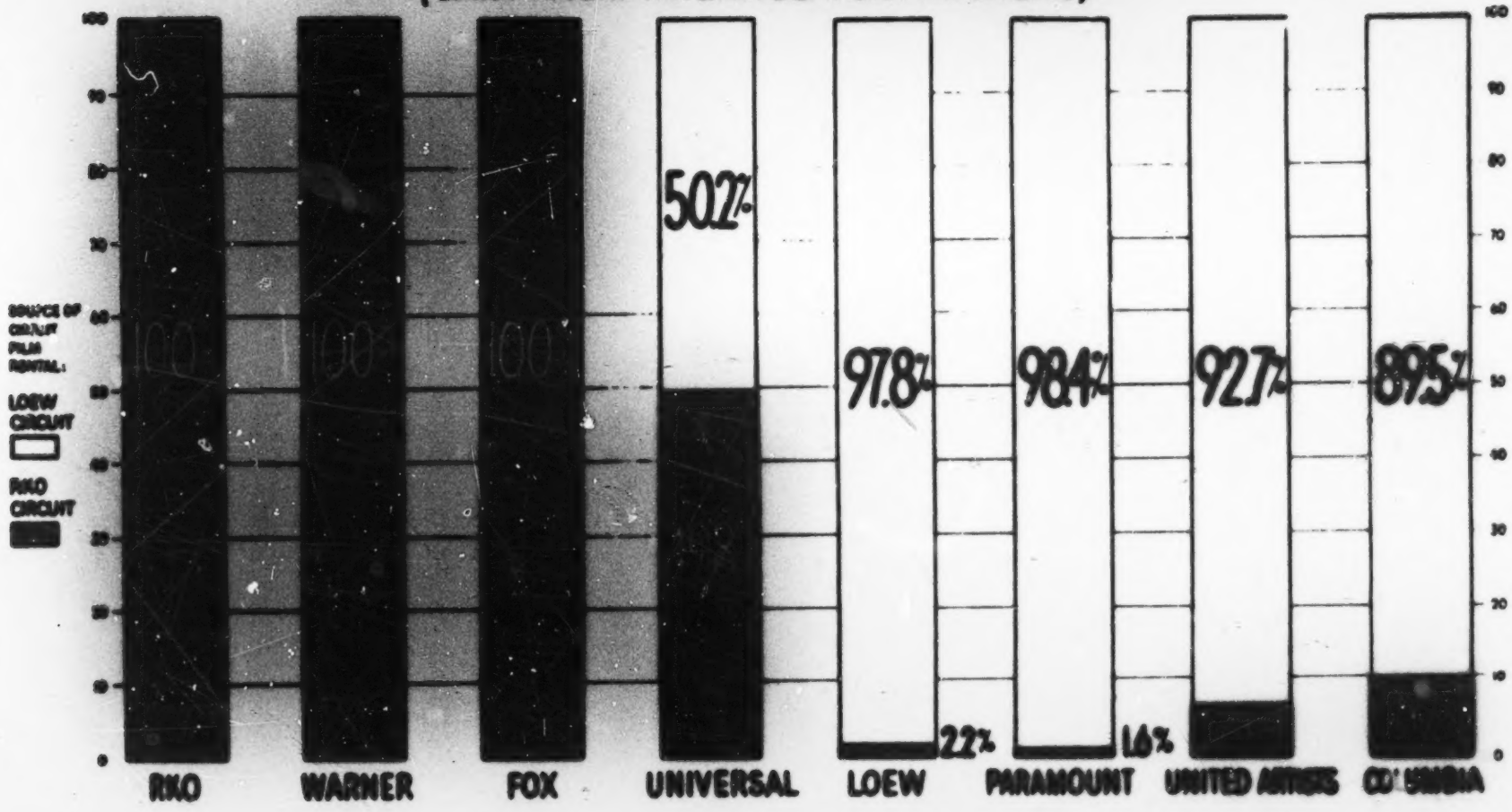
FIRST & SECOND NEIGHBORHOOD RUN THEATERS OPERATED BY LOEW & RKO CIRCUITS IN BOROUGHS OF MANHATTAN, BROOKLYN, BRONX & QUEENS



PLAINTIFF'S EXHIBIT 9

DIVISION OF EIGHT MAJOR DISTRIBUTORS' PRODUCT BETWEEN LOEW'S & RKO METROPOLITAN CIRCUITS 1940-48 AS SHOWN BY FILM RENTALS PAID BY CIRCUITS

(DATA FROM INTERROGATORY ANSWERS)



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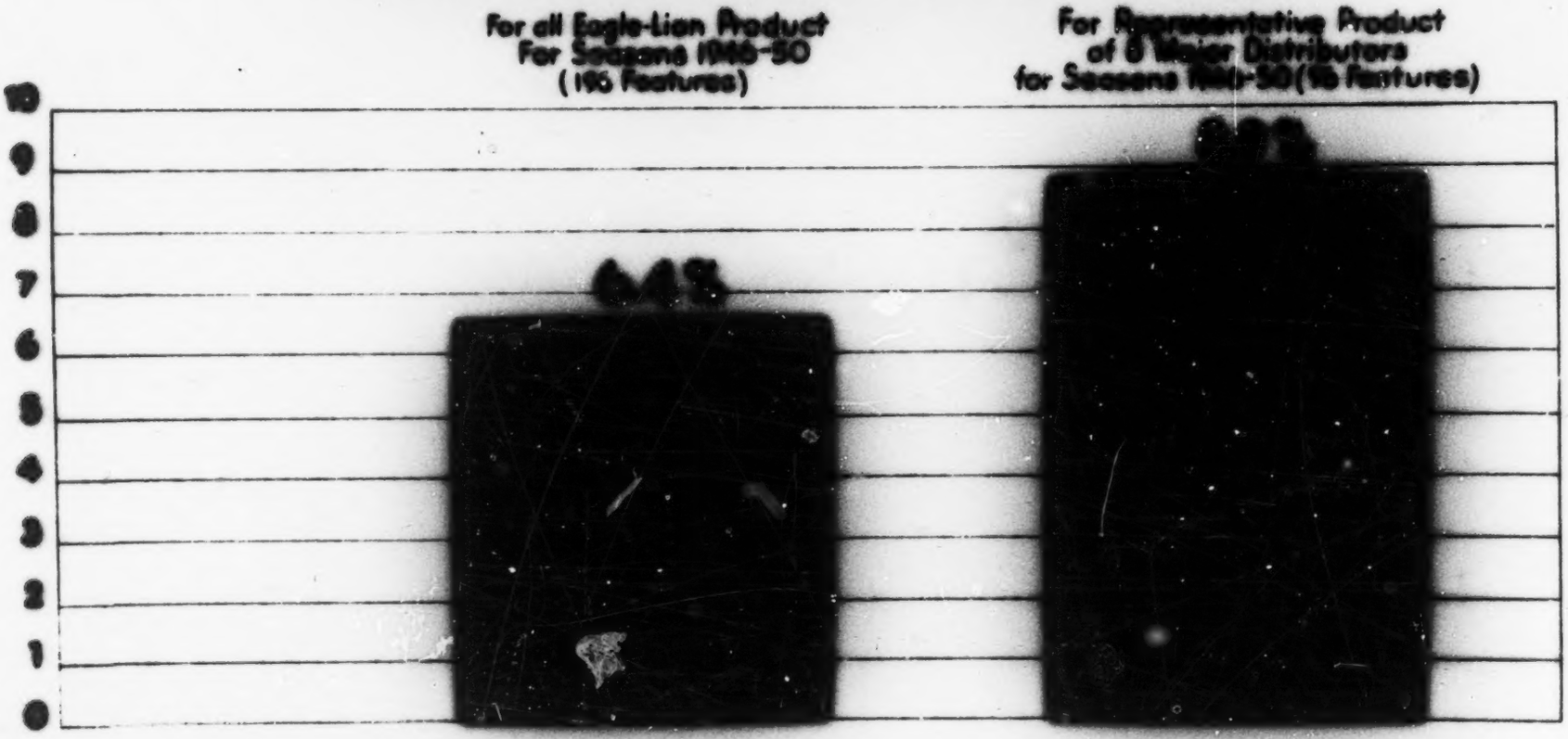
PLAINTIFF'S EXHIBIT 10

[illegible]

Ratio of Subsequent Run Rental from Metropolitan New York to National Film Rental Less such Subsequent Run Rental



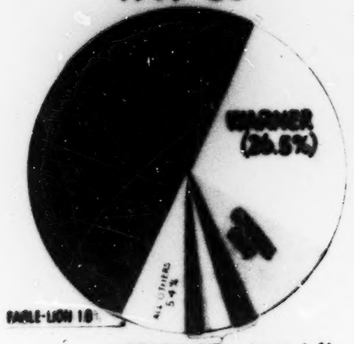
PLAINTIFF'S EXHIBIT 22

DISTRIBUTION OF FILM RENTAL PAID BY THE RKO and LOEW METRO[illegible]

(Data from Interrogatory Answers)

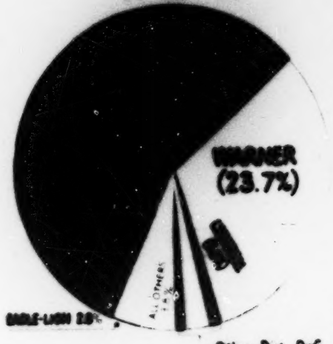
RKO CIRCUIT

1949-50



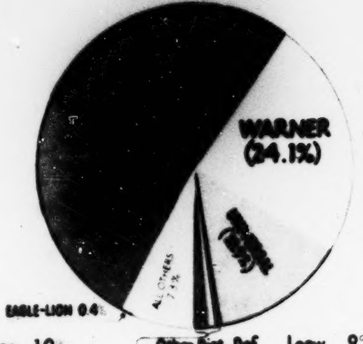
Other Dist.-Def.	Loew	1.4%
	Par.	.7%
	Col.	2.2%
	U.A.	2.3%
		6.6%

1948-49

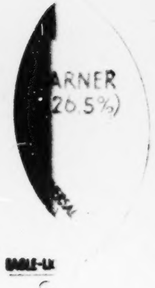


Other Dist.-Def.	Loew	10%
	Par.	6%
	Col.	19%
	U.A.	12%
		47%

1947-48

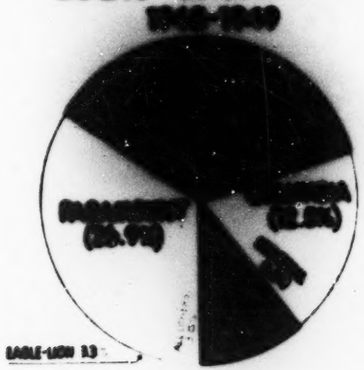


Other Dist.-Def.	Loew	.9%
	Par.	.6%
	Col.	.3%
	U.A.	.2%
		2.0%



LOEW CIRCUIT

1948-1949

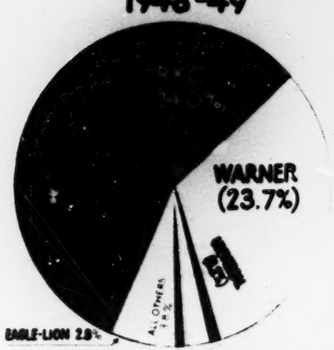


FILM RENTAL PAID BY THE RKO and LOEW METROPOLITAN CIRCUITS

(Data from Interrogatory Answers)

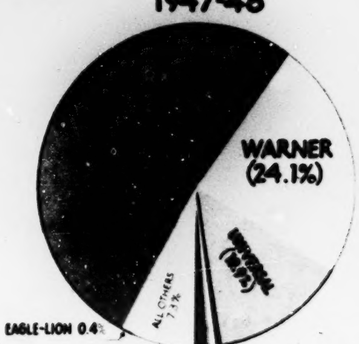
RKO CIRCUIT

1948-49



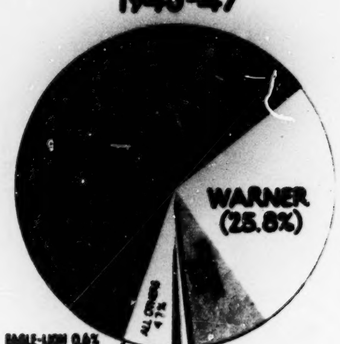
Other Dist.-Def.	Loew	10%
	Par.	.6%
	Col.	19%
	U.A.	12%
		47%

1947-48



Other Dist.-Def.	Loew	9%
	Par.	.6%
	Col.	.3%
	U.A.	.2%
		2.0%

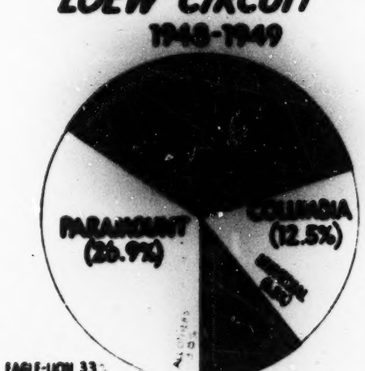
1946-47



Other Dist.-Def.	Loew	.7%
	Par.	.5%
	Col.	.4%
	U.A.	.2%
		1.8%

LOEW CIRCUIT

1948-1949



Plaintiff's Exhibit 26

SUMMARY

FILM RENTAL

Distributor	No. of Pictures	National	New York 1st Run	New York Metropolitan	New York Metropolitan Less 1st Run	National Less N.Y. Metropolitan Plus N.Y. 1st Run
Paramount	12	27,344.800	812,800	3,034,000	2,221,200	25,123,600
Fox	12	13,143,200	402,400	1,540,400	1,138,000	12,005,200
Warner	12	15,184,900	148,900	1,346,000	1,197,100	13,987,800
Loew	12	20,315,600	651,500	2,336,600	1,685,100	18,630,500
RKO	12	13,289,000	352,900	1,738,600	1,385,700	11,903,300
Columbia	12	7,442,200	42,800	664,600	621,800	6,820,400
Universal	12	7,789,200	43,600	524,000	480,400	7,308,800
United Artists	12	7,303,000	114,100	560,700	446,600	6,856,400
Total	96	111,811,900	2,569,000	11,744,900	9,175,900	102,636,000
Eagle Lion	196	39,107,800	1,018,700	3,380,900	2,362,200	36,745,600

RATIOS TO NATIONAL LESS N.Y. METROPOLITAN PLUS N.Y. FIRST RUN

	New York Metropolitan	N.Y. 1st Run	N.Y. Metropolitan Less 1st Run
Paramount	.121	.032	.088
Fox	.128	.034	.095
Warner	.096	.011	.086
Loew	.125	.035	.090
RKO	.146	.030	.116
Columbia	.097	.006	.091
Universal	.072	.006	.066
United Artists	.082	.017	.065
Total	.114	.025	.089
Eagle Lion	.092	.028	.064

Plaintiff's Exhibit 30

August 21, 1948

Mr. Joseph Vogel
Loews, Inc.
1540 Broadway
New York City, N. Y.

Dear Joe:

I have been needling Bill Heineman every day for the past six weeks on the New York situation. Our pictures have been backed up to an impossible extent in this territory and we have been getting nowhere fast. All that I have gotten from Bill has been excuses—that he has been trying to get things set with your company, that things may break tomorrow, or the next day, or next week—meanwhile nothing happens. Finally I decided that the only thing to do was to drop you this note to try to bring this situation to a head.

Joe, this is really a pathetic sitaution. Before I took on my present responsibility I naturally knew of the New York problem through my activities as counsel for distributors,—but I never realized the true impact until this opportunity to see it work at first hand. We have put money, time and energy of I don't know how many people into the task of building our company. We have labored night and day for the past two years, have tried to demonstrate the vigor and the initiative to take on obstacles as they come along and lick them, but nobody has come up with any answer in New York. There is no doubt that a solution must be found. No company operating on a scale such as ours can find permanent stability without having a fair chance to get on the screen in New York.

It was one thing when we first started, to be told that our pictures were problem pictures and that a new company could not expect to be bailed out of such problem pictures in the way in which older customers might be aided. We heard this story all over the country, but in practically

every other situation we have since broken it down by sheer dint of reasonably competent picture making. Yet in New York we are still limping along. Frankly, I find it impossible to explain this bottle-neck to Bob Young and the other people who have poured so much money into our operation.

Now, apart from everything else, we have two programs that without any doubt are entitled to go down the line—one, Noose Hangs High and Raw Deal, and the second, Canon City and Mickey. These should have been set weeks ago.

Joe, I think of you as one of the real statesmen in this business. I felt this in the personal contacts that we have had together, as well as from the universal esteem in which you are held in the industry. My feelings about the health and decency of this whole business will in no small measure ride on your answer. Where do we go from here?

Yours,

ABK:dc

August 31, 1948

Mr. Arthur B. Krim, Pres.,
Eagle-Lion Studios, Inc.,
7324 Santa Monica Blvd.,
Hollywood 46, Calif.

Dear Arthur:

I received your letter of the 21st and appreciate the expression of your personal regard for me. You cannot be too familiar with conditions in New York, as your statement that you have no fair chance of getting on the screens in New York is very much in error. Ninety per cent of the pictures presented to us by your Company have played our theatres. True, we have not always seen eye to eye as to their merit, but that, of course, is a problem we have with each Distributor. Your sales people demand the highest

rental terms and the highest allocation. We, in turn, try to fit these pictures into the scheme of things which will best satisfy our customers who, after all, pay their money at the boxoffice to the extent that they enjoy our shows. If the shows booked are unattractive to them, they will not patronize our theatres, and a small gross is the result.

Presently we entertain a difference of opinion as to Noose Hangs High and Raw Deal as a double-feature show. We think it would be a great mistake to book these two films together. Mr. Picker notified Jack Schlaifer that we would be willing to take a chance and play Canon City and Noose Hangs High together on one bill. We disagree also on Mickey. We think this is a small picture and can only be used on the short half. Raw Deal can be used as a second feature on the long half.

We have gone out of our way, Arthur, to do everything possible to give your pictures every consideration consistent with good showmanship and our obligation both to our Company and the public who patronize our theatres. I am very sorry to find out at this late date that our efforts on your Company's behalf are not appreciated.

With kindest regards and best wishes,

Sincerely,

JOE

JRV*LJ

Plaintiff's Exhibit 32

DATA AS TO CIRCUIT RENTALS ON EAGLE LION PICTURES WHICH PLAYED ON LOEW OR RKO CIRCUITS

Title	Long Half Top or Split	Loew Circuit Long Half Second	Short Half
Her Sister's Secret			$ 2,600.
Devil On Wheels			4,300.
Untamed Fury			3,600.
Born To Speed			4,200.
Corsican Brothers (R)			9,300.
South of Pago Pago (R)			9,300.
The Big Fix			4,300.
Man In The Iron Mask			6,000.
Philo Vance's Gamble			4,300.
Railroaded			2,600.
Gentlemen In the Dark			6,000.
Three On A Ticket			3,600.
Killer At Large			4,100.
Count of Monte Cristo (R)			1,400.
Son of Monte Cristo (R)			1,400.
International Lady (R)			1,000.
My Son, My Son (R)			1,000.
T Men	71,800.		
Red Stallion		17,700.	
Out Of The Blue	38,700.		
Mickey		17,600.	
Ruthless		17,600.	
Repeat Performance		19,000.	
Last Honeymoon		17,000.	
Adventures of Casanova		17,700.	
Love From A Straager		17,700.	
It's A Joke Son			3,700.
Adventuress		17,700.	
Blonde Savage			3,200.
Seven Sinners (R)			5,000.
Bury Me Dead			3,200.
Close Up		13,000.	
Suiter's Gold (R)			5,000.
Shed No Tears			600.
Tulsa	53,600.		
He Walked By Night	76,000.		
Northwest Stampede		17,600.	
Let's Live A Little		17,600.	
Red Stallion In Rockies			1,300.
Hollow Triumph		17,600.	
Adventures of Gallant Bess			900.
Alimony			600.
High & Lonesome		14,900.	
Port of New York			5,500.
Golden Gloves Story		17,300.	
Kill Or Be Killed			1,300.
I Killed Geronimo			1,800.
Federal Man			1,600.
Congolaise			1,600.
Good Time Girl			1,800.

(Plaintiff's Exhibit 32 Continued)

DATA AS TO CIRCUIT RENTALS OF EAGLE LION PICTURES WHICH PLAYED ON LOEW OR RKO CIRCUITS

Title	Long Half Top or Split	RKO Circuit Long Half Second	Short Half
Gas House Kids Go West			1,800.
Gas House Kids In Hollywood			,500.
The Brute Man			1,500.
Philo Vance's Secret Mission			1,800.
Philo Vance Returns			1,500.
Too Many Winners			1,500.
The Noose Hangs High		22,500.	
Canon City	76,700.		
Raw Deal	11,300.		
Bedelia		17,000.	
Man From Texas			2,000.
The Smugglers		11,300.	
Assigned to Danger			1,500.
Green For Dangers		10,000.	
The Cobra Strikes			1,500.
Lady At Midnight			600.
Sword Of The Avenger			600.
Big Cat		11,300.	
In This Corner			2,000.
Parole			1,500.
Behind Locked Doors			4,400.
Strange Mrs. Crane			1,500.
Rebecca (R)			2,500.
Red Shoes	62,500.		
Destination Moon	33,600.		
Sundowners		8,000.	
Jackie Robinson Story	28,500.		
The Great Ruppert		11,000.	
Story of G I Joe		12,200.	
Boy From Indiana			1,800.
The Torch		10,400.	
Arabian Nights (R)			2,100.
Fighting Stallion			1,200.
Sudan (R)			2,100.
Tillie's Romance			800.
Loew's Circuit Totals	240,100.	240 000.	106,100.
Loew's Circuit Average	60,000.	17,169.	3,300.
RKO Circuit Totals	201,300.	125,000.	35,700.
RKO Circuit Average	50,300.	12,500.	1,700.
Loew & RKO Combined Average	55,200.	15,200.	2,700.

Plaintiff's Exhibit 33

DATA AS TO CIRCUIT RENTALS ON 96 PICTURE SAMPLE FURNISHED BY 8 MAJOR DISTRIBUTORS AND RKO AND LOEW CIRCUITS

	Loew's Circuit Rental		
	Long Half Top or Split	Long Half Second	Short Half
Paramount			
Blue Skies	$214,200.	$	$
Desert Fury	113,000.		
Jungle Flight			5,700.
Unconquered	182,600.		
Sainted Sisters	115,800.		
Hatter's Castle			5,400.
Paleface	181,600.		
The Accused	97,300.		
Disaster			4,900.
Samson & Delilah	257,100.		
Chicago Deadline	70,200.		
Paid In Full		19,000.	
Loew			
The Hucksters	124,000.		
Love Laughs At Andy Hardy	*		*
Boomtown (R)	*		
Cass Timberlane	*		
Desire Me		17,300.	
Tenth Avenue Angel	180,400.		
Words & Music	30,600.		
Hills of Home		18,900.	
Night At The Opera (R)	*		
On The Town		*	
Doctor & The Girl		*	
Tension			
Columbia			
Johnny O'Connor	122,600.		
Blondie's Holiday		18,700.	
B. B. & The Law			5,500.
Relentless	100,000.		
Thunderhoof			3,800.
Crime Doctor's Gamble			4,000.
Jungle Jim			2,700.
Manhattan Angel			2,900.
Miss Grant Takes Richmond		18,400.	
[illegible]		Did Not Play Circuit	

Sainted Sisters	115,800.		
Hatter's Castle			5,400.
Paleface	181,600.		
The Accused	97,300.		
Disaster			4,900.
Samson & Delilah	257,100.		
Chicago Deadline	70,200.		
Paid In Full		19,000.	
Loew			
The Hucksters	124,000.		
Love Laughs At Andy Hardy	*		
Boomtown (R)			*
Cass Timberlane	*		
Desire Me	*		
Tenth Avenue Angel		17,300.	
Words & Music	180,400.		
Hills of Home	30,600.		
Night At The Opera (R)		18,900.	
On The Town	*		
Doctor & The Girl		*	
Tension		*	
Columbia			
Johnny O'Connor	122,600.		
Blondie's Holiday		18,700.	
B. B. & The Law			5,500.
Relentless	100,000.		
Thunderhoof			3,800.
Crime Doctor's Gamble			4,600.
Jungle Jim			2,700.
Manhattan Angel			2,900.
Miss Grant Takes Richmond		18,400.	
Mark Of The Gorilla		Did Not Play Circuit	
Barbary Pirate.			1,600.
United Artists			
Ramroad	*		
Bachelor's Daughter	*		
Susie Steps Out		Did Not Play Circuit	
Pitfall	96,000.		
Lured	47,200.		
Kings Of Olympics		Did Not Play Circuit	
Africa Screams		28,900.	
Vicious Circle		Did Not Play Circuit	
Kiss For Corliss		Did Not Play Circuit	
Underworld Story		Did Not Play Circuit	

* No data as to circuit play-off supplied.

(Plaintiff's Exhibit 33 Continued)

DATA AS TO CIRCUIT RENTALS ON 96 PICTURE SAMPLE FURNISHED BY 8 MAJOR DISTRIBUTORS AND RKO AND LOEW CIRCUITS

	Loew's Circuit Rental		
	Top or Split Long Half	Second Long Half	Short Half
Universal			
Wicked Lady		18,600.	
Black Bart		17,700.	
Nicholas Nickelby	Did Not Play Circuit		
End Of The River	Did Not Play Circuit		
Johnny Stool Pigeon			24,000.
Madeline	Did Not Play Circuit		
Louisa	27,400.		
Loew Circuit Average	122,500.	19,600.	6,100.
	RKO Circuit Rental		
Fox			
13 Rue Madeline	141,300.		
Brasher Doubloon		12,700.	
How Green Was My Valley (R)			2,300.
Street With No Name	120,800.		
Anna Karenina	Did Not Play Circuit		
I Wake Up Screaming			6,300.
Yellow Sky	75,200.		
Fighting Men Of The Plains		11,300.	
Steamboat Round The Bend	Did Not Play Circuit		
Under My Skin	43,600.		
Wabash Avenue	48,900.		
Two Flags West		*	
Warner			

How Green Was My Valley (R)			2,000.
Street With No Name	120,800.		
Anna Karenina		Did Not Play Circuit	
I Wake Up Screaming			6,300.
Yellow Sky	75,200.		
Fighting Men Of The Plains		11,300.	
Steamboat Round The Bend		Did Not Play Circuit	
Under My Skin	43,600.		
Wabash Avenue	48,900.		
Two Flags West		*	
Warner			
Pursued	108,900.		
Cry Wolf	86,700.		
Marked Woman (R)			23,700.
The Voice Of The Turtle	84,100.		
To The Victor		13,100.	
God's Country & The Woman		Did Not Play Circuit	
Flamingo Road	72,000.		
Colorado Territory		13,100.	
Casablanca			16,200.
Caged	71,600.		
Montana	46,700.		
Destination Tokyo (R)			6,600.
RKO			
Farmer's Daughter	157,300.		
Woman On Beach	62,100.		
Dick Tracy's Dilemma		13,100.	
I Remember Mama	92,800.		
Bace Street		13,900.	
Arizona Ranger (W)		Did Not Play Circuit	
Best Years Of Our Lives	43,100.		
The Window	64,500.		
Brothers In The Saddle		Did Not Play Circuit	
Mighty Joe Young	70,600.		
They Live By Night		11,600.	
Storm Over Wyoming		Did Not Play Circuit	

(Plaintiff's Exhibit 33 Continued)

DATA AS TO CIRCUIT RENTALS ON 96 PICTURE SAMPLE FURNISHED BY 8 MAJOR DISTRIBUTORS AND RKO AND LOEW CIRCUITS

	RKO Circuit Rental		
	Top or Split Long Half	Second Long Half	Short Half
Columbia			
Lust For Gold	65,400.		
Universal			
Buck Private Comes Home	73,600.		
Red Canyon		11,500.	
Saxon Charm		11,500.	
South Sea Sinner		11,200.	
One Way Street		10,900.	
United Artists			
Love Happy	16,800.		
Lucky Stiff			4,400.
RKO Average	77,300.	12,200.	9,900.
Combined Loew & RKO Average	97,500.	15,300.	7,500.

Plaintiff's Exhibit 34

SCHEDULE SHOWING INTERVAL BETWEEN FIRST RUN BROADWAY AND FIRST NEIGHBORHOOD RUN ON ALL EAGLE LION FILMS WHICH PLAYED LONG HALF ON RKO OR LOEW'S CIRCUIT

Loew's Circuit

Title	Theatre	First Run Rental	First Run Play Dates	First Neighborhood Run Date	Circuit Rental	Days Between Runs
T-Men	Criterion	$17,800.	1/22- 2/17/48	4/28/48	$71,800.	70
Red Stallion	Gotham	7,500.	11/27-12/10/47	6/23/48	17,700.	195
Mickey	Gotham	-0-	7/17- 29/48	1/12/49	17,600.	167
Ruthless	Gotham	6,700.	9/ 3- 23/48	1/ 6/49	17,600.	105
Repeat Performance	Rivoli	2,100.	7/ 1- 22/47	10/ 8/47	19,000.	77
Adventures of Casanova	Globe	7,800.	3/20- 4/ 2/48	8/11/48	17,700.	131
Love From A Stranger	Victoria	4,000.	11/27-12/10/47	3/19/48	17,700.	90
Adventuress	Victoria	17,200.	4/ 3- 23/47	1/14/48	17,700.	266
Close Up	Globe	5,200.	4/ 3- 18/48	6/30/48	13,000.	72
Tulsa	Capitol	4,500.	5/26- 6/ 8/49	9/28/49	53,600.	112
He Walked By Night	Criterion	13,100.	2/ 5- 25/49	5/11/49	76,000.	75
Northwest Stampede	Globe	1,800.	12/ 9- 15/48	6/15/49	17,600.	182
Let's Live A Little	Capitol	4,000.	12/ 9- 22/48	5/11/49	17,600.	139
Hollow Triumph	Globe	4,900.	10/28-11/ 3/48	2/16/49	17,600.	105
					Average	128

RKO Circuit

Noose Hangs High	State	3,200.	5/28- 6/10/48	10/20/48	22,500.	132
Canon City	Criterion	7,200.	7/ 7- 7/27/48	12/ 1/48	76,700.	126
Raw Deal	Victoria	11,800.	7/ 8- 8/ 1/48	12/ 1/48	11,300.	121
Bedelia	Victoria	21,500.	2/ 7- 27/47	7/ 2/47	17,000.	124
The Smugglers	Rialto	5,000.	3/27- 4/23/48	1/12/49	11,300.	262
Big Cat	Palace	1,000.	7/28- 8/ 3/49	10/26/49	11,300.	82
Red Shoes	Victoria	19,700.	11/21-12/25/50	1/31/51	62,500.	36
Destination Moon	Mayfair	62,900.	6/27- 8/14/50	1/ 9/51	33,600.	147
Sundowners	Palace	2,500.	5/ 4- 10/50	1/ 9/51	8,000.	147
Jackie Robinson Story	Astor	-0-	5/17- 6/20/50	9/ 3/50	28,500.	74
The Great Ruppert	Palace	2,000.	4/13- 19/50	6/14/50	11,000.	55
Story of GI Joe	Palace	2,000.	8/10- 16/50	9/ 3/50	12,200.	17
The Torch	Globe	4,500.	8/19- 9/ 1/50	12/ 5/50	10,400.	94
					Average	109

Excerpt From Printed Record of Stenographer's Minutes in United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, United States District Court, Southern District of New York, November 8, 1948, pp. 243-247.

GEORGE FLEITMAN, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Wright:

Q. Where do you live, Mr. Fleitman? A. 2830 Grand Concourse, Bronx.

Q. What is your present occupation? A. Assistant foreign sales manager.

Q. Of what company? A. Eagle Lion Films.

Q. And you were formerly the assistant secretary of PRC Pictures, Inc.? A. That is correct.

Q. That company, by the way, was dissolved in August 1947? A. That is right.

(372)

Q. You were the gentleman who compiled the figures that appear in this affidavit marked Exhibit 495 for identification? A. That is right.

Q. Can you just read into the record the total number of features released by PRC during the 1943-1944 season?

Mr. Proskauer: Your Honors, I make the same objection to this testimony that I made yesterday, not a technical objection, but based on the contention that the concession I read from Mr. Wright takes this evidence out of this case. I assume your Honors will overrule it.

Judge Hand: Yes.

Mr. Wright: Will you read the last question?

(Last question read.)

A. PRC released 20 features during that season.

Q. What was the total domestic film rental received for those features? A. $1,873,053.

Q. That was received from how many bookings or exhibitions? A. 69,162 bookings.

Q. Then you have shown there the amount of the film rental for those features that came from the various defendants in this suit? A. Yes.

(373)

Q. And can you read those figures? A. Loew's Incorporated, rentals, $50,724. 593 bookings.

If you have no objection to me dropping the cents, I will.

Q. All right. A. Paramount Pictures, $169,526. Bookings, 5,864.

Radio-Keith-Orpheum, $47,528. 517 bookings.

Warner Bros. Pictures, $81,057. 2,125 bookings.

National Theatres, $101,299. 2,710 bookings.

RKO and Paramount—and parenthetically listed as Butterfield Circuit—$28,735. 793 bookings.

Paramount, Warners and Joseph Cooper—and parenthetically listed as Standard Theatres Corporation—$2,945. 37 bookings.

Mr. Wright: You may cross-examine.

Cross Examination by Mr. Proskauer:

Q. Mr. Fleitman, you said that PRC was dissolved. It was taken over in some way by the Eagle Lion Company where you now work, wasn't it? A. I do not know the exact legal method which was used for the dissolution and the absorption, if any.

Q. I don't care about the exact legal method. Talking just man to man, in plain English, PRC was absorbed in some way into Eagle Lion? A. Yes.

Q. And took over the staff and the business? A. Yes.

(374)

Q. So when you said it dissolved, you did not mean it vanished; you meant it went into Eagle Lion? A. Well,

I would not want to answer for fear of placing in the record something which is entirely incorrect.

Q. Well, I withdraw it then. I think you have sufficiently indicated what I have in my mind. Now before—I am going to use the word "merger" not in any legal sense but just in the sense of this arrangement you have testified to—before that merger PRC produced a very much lower type of picture than Eagle Lion is now producing, didn't it? A. I do not think I am qualified to answer that.

Q. You were sales manager, weren't you? A. No, sir.

Of PRC? A. No, sir.

Q. What were you? A. I was the comptroller and assistant secretary of the corporation.

Q. Well, as the comptroller, tell us what was the approximate cost range of these pictures you produced? A. I am talking about PRC now. A. PRC?

Q. Yes. A. They ranged up to a $300,000 budget.

Q. That was your top? A. That is right.

Q. And most of them were considerably below that,

(375)

weren't they? A. Yes.

Q. What was your average, would you say? Just give me an estimate. A. Over the entire period of its operation?

Q. No, of these years that you have testified to. A. 1943-1944?

Q. A. I would judge it was slightly in excess of a hundred thousand—the features.

Q. You never produced any of these pictures the cost of which runs up into the millions? I am talking about PRC now. A. That is correct.

Q. And did you ever sell a picture during that period to an independent, we will say, like the Music Hall, Radio City Music Hall? A. No, we did not.

Q. Or to any of the great independent first run theatres? A. Are you speaking of the Broadway premiere houses?

Q. Yes. A. No.

Q. You were producing at that time pictures that were generally known as second feature pictures, weren't you, that filled in on two-feature shows, for the most part? A. That is correct.

Q. Now, when you got down to the Eagle Lion era, you began to produce a much higher grade of picture, didn't you? much more expensive pictures? A. Yes, sir.

(376)

Q. And you had stars like Joan Leslie and Joan Bennett; you had stars like that, didn't you? A. They appeared in our pictures, that is correct.

Q. That was different from the old PRC days?

Mr. Wright: Of course, this is objected to as not cross-examination. He was not offered for anything but the PRC figures.

Judge Hand: Overruled.

Mr. Kroskauer: Don't be disturbed by the interruption. Just tell me. I want the general picture from you, Mr. Fleitman.

The Witness: Could I have that last question?

(Last question read.)

A. That is correct.

Q. Very different? A. Yes.

Q. Now, Warner Bros. always was a customer of yours, wasn't it, both in the PRC days and in the Eagle Lion days? A. I believe so, yes.

Q. And with Mr. Wright's permission, I am going to ask you whether these figures do not generally accord with your recollection of how we traded with you:

In 1943-1944 we bought from you eighty thousand—I am leaving off the hundreds—dollars' worth of pictures, approximately;

In 1944-1945, $107,700;

(377)

In 1945-1946, $173,000;

In 1946-1947, just short of $202,000—the figure is $201,976.

As comptroller do those figures generally accord with your recollection? A. I have no recollection beyond the 1943-1944.

Mr. Proskauer: Mr. Wright, would you be willing to concede, subject to correction, that those figures are accurate?

Mr. Wright: I have no more information about the accuracy of the figures than you have.

Mr. Proskauer: All right, then I shall call a witness to prove that that is what we paid these people, if you put me to it. It is a matter of record.

Q. Now, when did Eagle Lion begin to produce these very much better pictures? A. The latter part of 1947.

Q. And isn't it a fact that for the season 1947-1948 Warner Brothers have paid you in license fees $537,251? A. I don't know.

Q. Well, does that accord generally with your recollection? A. I don't know.

Q. You know Warner Brothers are a very good customer of yours, don't you? A. My only way of knowing it is by hearsay. I am not in the domestic department, nor do I check

(378)

with it.

Q. Well, you know who your good customers are, don't you? A. Do I know who our good customers are?

Q. Yes. A. I only have knowledge with respect to the foreign field; I have no knowledge of the domestic department.

* * * * * * * * * *

B. Feature Film Rentals Paid to Distributor Defendants and All Other Distributors By Theatres Affiliated with Producers-Exhibitor Defendants for Features Released During the 1943-44 Season as Reported by them in Answers to Interrogatory 12 (Ex. 424, R. 2276, 2284).

Distributor defendants and all others receiving rentals	RKO		Fox[1]		Warner Bros.[2]		Paramount[3]		Loew's	
	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total
RKO	$3,916,743	30.6	$2,411,915	9.5	$2,330,176	9.9	$3,556,080	7.1	$ 403,849	2.0
Fox	2,181,515	17.0	5,069,701	20.0	2,363,866	10.1	7,263,767	14.6	1,310,639	6.6
Warner Bros.	2,013,330	15.7	2,437,953	9.6[4]	6,212,266	26.5	5,681,831	11.4	403,211	2.0
Paramount	747,537	5.8	3,956,642	15.6	3,030,692	12.9	14,231,293	28.6	2,887,939	14.4
Loew	650,229	5.2	5,958,640	23.5	4,045,440	17.3	10,041,241	20.1	9,282,490	46.4
Total paid to producer-exhibitors	9,509,354	74.3	19,834,851	78.2	17,982,440	76.7	40,774,212	81.8	14,288,128	71.4
Columbia	707,092	5.5	1,162,319	4.6	1,316,509	5.6	2,280,947	4.6	1,743,975	8.7
United Artists	192,587	1.5	1,157,149	4.6	725,507	3.1	1,378,551	2.8	1,718,040	8.6
Universal	1,990,609	15.5	2,056,032	8.1	2,518,722	10.7	3,395,247	6.8	1,746,797	8.8
All others	412,918	3.2	1,131,185	4.5	899,056	3.9	2,006,654	4.0	504,662	2.5
Total	12,812,560	100.0	25,341,536	100.0	23,442,234	100.0	49,835,611	100.0	20,001,602	100.0

1 Covers the period Dec. 26, 1943 to Dec. 30, 1944, and includes shorts and newsreels.

2 Includes shorts and newsreels.

3 The above figures for accounting purposes are as of Dec. 20, 1944 but are believed to reflect the license fees for the pictures released during the 1943-44 season.

4 Excludes about $1,465,000 paid for "This Is The Army."

Source: Defendants' answers to Interrogatory 12, 1945. Exhibits: 93—RKO; 43—Fox; 125—Warner, 125-a—Warner; 83—Paramount; 56—Loew's.